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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 638

BALTIMORE & OHIO RAILROAD COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED DECEMBER 13, 1937.

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IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity 15266

THE BALTIMORE AND OHIO RAILROAD COMPANY, CENTRAL Indiana Railway Company, The Chesapeake and Ohio Railway Company, Chicago & Erie Railroad Company, Chicago, Indianapolis & Louisville Railway Company, H. R. Kurrie and Holman D. Pettibone, Trustees, Detroit, Toledo & Ironton Railroad Company; The Detroit & Toledo Shore Line Railroad Company, Erie Railroad Company, Grand Trunk Western Railway, The New York Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, Norfolk & Western Railway Company, H. B. Stewart and William L. Day, Trustees, Northern Ohio Railway Company and Akron, Canton & Youngstown Railway Company; The Pennsylvania Railroad Company, Pere Marquette Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company and The Ann Arbor Railroad Company; The Wheeling and Lake Erie Railway Company, Plaintiffs,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, Defendants

BILL OF COMPLAINT—Filed July 22, 1936

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Plaintiffs, more fully described hereinafter, bring this bill of complaint against the United States of America and [fol. 5] the Interstate Commerce Commission, and hereby sue to enjoin, set aside, suspend and annul certain orders

of the Interstate Commerce Commission hereinafter described. Plaintiffs complain and say:

I

The corporate names of the plaintiffs herein, their citizenship and the places of their residence are as follows:

The Baltimore and Ohio Railroad Company is a corporation organized under and by virtue of the laws of the State of Maryland, and has its principal office in Baltimore, Maryland.

The Central Indiana Railway Company is a corporation organized under the laws of the State of Indiana and has its principal office in Anderson, Ind.

The Chesapeake & Ohio Railway Company is a corporation organized under the laws of the state of Virginia, with principal office in Richmond, Virginia.

The Chicago & Erie Railroad Company is a corporation organized under the laws of the State of Indiana and has its principal office in Cleveland, Ohio.

The Chicago, Indianapolis & Louisville Railway Company is a corporation under the laws of the State of Indiana and has its principal office in Chicago, Ill.

The Detroit & Toledo Shore Line Railroad Company is a corporation under the laws of the State of Michigan and has its principal office in Detroit, Mich.

The Detroit, Toledo & Ironton Railroad Company is a corporation under the laws of Michigan and has its principal office in Detroit, Mich.

The Erie Railroad Company is a corporation under the laws of New York, with its principal office in New York, N. Y.

[fol. 6] The Grand Trunk Western Railway Company is a corporation of the Dominion of Canada and has its principal office in Montreal, Canada.

The New York Central Railroad Company is a corporation under the laws of the States of Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York, with its principal office in New York, N. Y.

The New York, Chicago & St. Louis Railroad Company is a corporation organized under the laws of the State of Ohio, with principal office in Cleveland, Ohio.

The Norfolk & Western Railway Company is a corporation under the laws of Virginia, with its principal office in Roanoke, Va.

The Northern Ohio Railway Company and the Akron, Canton & Youngstown Railway Company are corporations under the laws of Ohio, with principal offices at Akron, Ohio.

The Pennsylvania Railroad Company is a corporation of Pennsylvania, with its principal office in Philadelphia, Pa.

The Pere Marquette Railway Company is a corporation of Michigan, with its principal office in Detroit, Mich.

The Wabash Railway Company is a corporation of Missouri, with its principal office in St. Louis, Mo.

The Ann Arbor Railroad Company is a corporation of Michigan, with its principal office in Toledo, Ohio.

The Wheeling and Lake Erie Railway Company is a corporation of Ohio, with its principal office in Cleveland, Ohio.

All of the aforesaid plaintiffs are common carriers, by railroad, engaged in the transportation of freight in interstate commerce, subject to the provisions of the Interstate Commerce Act, and as such common carriers participate, inter alia, in the transportation of coke in carloads, under joint through rates from points in Alabama, Tennessee and [fol. 7] Virginia to destinations in the States of Illinois, Indiana, Ohio and Michigan, which states in general comprise the rate territory commonly called central freight association territory, hereinafter referred to for convenience in this bill as central territory.

II

Defendant, United States of America, is made a party defendant as directed by the Congress of the United States and as required by Sections 46-48 of Title 28 of the Code of Laws of the United States of America.

Defendant, Interstate Commerce Commission, was created by the Act to Regulate Commerce, approved February 28, 1887, as amended (U. S. Code, Title 29, Section 11), and is specifically charged with the administration and enforcement of the provisions of said Act, and is hereinafter referred to as the "Commission."

III

This suit is brought for the purpose of having enjoined, set aside, annulled and suspended, certain orders of the Interstate Commerce Commission entered on March 11,

1935, and April 30, 1936, in Investigation and Suspension Docket No. 3985, entitled "Coke from Alabama and Tennessee to Central Territory," and Investigation and Suspension Docket No. 4198, entitled "Coke from Southern Points to Central Territory." Copies of said orders of the said Interstate Commerce Commission, together with the reports issued in said proceedings and referred to and made a part of said orders here sought to be enjoined, set aside, annulled and suspended, are attached to this bill and marked Exhibits A, B, and C, and made a part hereof with like force and effect as if set forth in extenso herein.

[fol. 8] IV

The parties upon whose petition the orders herein complained of were made, and which orders plaintiffs herein seek to have enjoined, set aside, suspended and annulled, are:

The Louisville & Nashville Railroad Company, a corporation of Kentucky with its principal office in Louisville, Ky.

The Southern Railway Company, a corporation of Virginia with its principal office and residence in Washington, in the District of Columbia.

The Nashville, Chattanooga & St. Louis Railway Company, a corporation of Tennessee with its principal office and residence in Nashville, Tenn.

J. M. Kurn and John G. Lonsdale, trustees for St. Louis-San Francisco Railway, a corporation of Missouri with its principal office and residence in St. Louis, Mo.

Tennessee Products Corporation, a corporation of Tennessee with its principal office and residence in Nashville, Tenn.

The Black Diamond Coal Mining Company, a corporation of Alabama with its principal office and residence in Birmingham, Ala.

The Alabama Iron and Steel Shippers' Conference, which your petitioners understand and believe to be a voluntary association of individuals and corporations with principal office in Birmingham, Ala.

Illinois Central Railroad Company, a corporation of Illinois, with its principal office and residence in Chicago, State of Illinois, and the Northern District of Illinois, Eastern Division.

Suit is brought in the said Northern District of Illinois, Eastern Division, under, and the jurisdiction of the court [fol. 9] depends upon, an Act of Congress approved October 22, 1913 (38 Stat. L. 219), Code of Laws of the United States, Title 28, Sections 41 (28) 42-48, inclusive, providing for the institution of suits to enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

V

The facts and circumstances leading to the orders of the Commission herein sought to be enjoined, vacated, and set aside, are as follows:

On or about, to-wit: September 1, 1932, the Citizens' Gas Company and others filed with the Commission their complaint (Dockets Nos. 23375 and 23375—Sub. No. 1) wherein it is alleged, inter alia, that the rates on coke, coke breeze, coke dust and coke screenings accorded southern producers of coke from the Birmingham, Ala., Chattanooga, Tenn., Harlan County, Ky., and Wise County, Va., districts to destinations in the States of Illinois, Indiana, Michigan and Ohio, are unduly preferential of producers in such districts, to the undue prejudice of the complainants named who produce coke at various points in the States of Illinois, Indiana, Michigan and Ohio, in violation of the provisions of Section 3 of the Interstate Commerce Act (Code of Laws of the United States, Title 49, Section 3); that on or about to-wit: February 16, 1929, the Alabama By-Products Corporation and others as complainants, filed with the Commission their complaint (Docket No. 22052) wherein it is alleged that the rates for the transportation of coke in carloads from Dolcito Junction, Alabama City, Holt and Woodward, Ala., to destinations in Illinois, Indiana, Ohio and the southern peninsula of Michigan are unreasonable and unduly prejudicial as compared with the rates accorded their competitors [fol. 10] located at Chattanooga, Tenn., Weirton, W. Va., and at various origins in central territory. The complainants referred to prayed that the Commission prescribe reasonable and unprejudicial rates to the destinations in central territory. The cases covered by the complainants referred to were consolidated with other proceedings pending before the Commission and were heard on a joint record before an examiner designated by the Commission. There-

after, on or about, to wit: June 30, 1933, the Commission entered its report (194 I. C. C. 640) and orders in the said consolidated proceedings, a true and correct copy of which, marked Exhibit D, is attached hereto and made a part hereof as fully as though set forth at length herein.

The Commission's ultimate findings as set forth in its report therein were as follows:

1. That the schedules under suspension in Investigation and Suspension Docket No. 3511 have not been justified.

2. That the interstate rates on coke, in carloads, between points in central territory and Illinois territory, assailed in Nos. 23173, 23173 (Sub. No. 1), 23375, 23375 (Sub. No. 1), and 23888 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed or may exceed, rates based on the distance scale set forth in Appendix 8, Column 2, except that to destinations in Michigan Zone C the rates should be based on the distance scale set forth in Appendix 8, Column 3, which rates we find are, and will be, reasonable.

3. That the rates on coke, in carloads, from Ashland, Ky., and Ironton and Portsmouth (New Boston), Ohio, to destinations in Wisconsin, except that portion in Illinois territory, Iowa, Missouri, Nebraska, South Dakota, and Minnesota, assailed in Nos. 23173 and 23173 (Sub. No. 1) were not [fol. 11] unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, (a) to destinations in Zone 1 and extended Zone C in Wisconsin of western trunk-line territory as described in Western Trunk-Line Class Rates, 164 I. C. C. 1, 200, 210, rates based on the distance scale set forth in Appendix 8, Column 3, and (b) to destinations west and south of Zone 1, rates based on that scale applied to the entire distance, plus the distance arbitraries set forth in Appendix 8, Column 4, for application to that part of the hauls west and south of Zone 1, which rates we find are, and will be, reasonable.

4. That the rates on coke, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan assailed in No. 22052 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates

based on the distance scale set forth in Appendix 8, Column 3, which rates we find are, and will be, reasonable.

5. That in applying the scales herein found reasonable distances should be computed over the shortest possible routes via existing connections for the interchange of carload traffic without transfer of lading, and specific point-to-point rates should be published.

6. That the rate on coke, in carloads, from Birmingham, Ala., to Omaha, Nebr., assailed in No. 23160 (Sub. No. 1) was not and is not unreasonable. The complaint will be dismissed.

7. That the findings and order in No. 16243, Indiana Coke & Gas Co. v. Ahnapee & W. Ry. Co., should be, and hereby are, vacated in so far as they conflict with the findings and order made herein.

8. Subsequent to the hearings in these cases a petition was filed on behalf of the Cincinnati, Georgetown Railroad [fol. 12] Company, named as a party defendant in Nos. 22052, 23375, 23375 (Sub. No. 1), and 23888, praying that it be excepted from the orders in those cases if they require the establishment of joint rates on coke throughout central territory, for the reason that in Ohio Farm Bureau Corp. v. Akron & B. B. R. Co., 171 I. C. C. 182, Division 3 found, among other things, that commodity rates consisting of combinations of separately established factors to and from Cincinnati and points on the line of the Cincinnati, Georgetown Railroad Company were not unreasonable or unduly prejudicial, and that in Eastern Class Rate Investigation, 177 I. C. C. 156, this carrier was exempted from Finding 13 in that case, and also in Application of Mississippi Valley B. L. Co., 178 I. C. C. 224, from the findings therein concerning the application of the Mississippi Valley Barge Line for through routes and joint rates. This petition is granted, and the Cincinnati, Georgetown Railroad Company will be exempted from the publication of joint rates on coke to or from points on its line.

9. To the rates prescribed herein may be added the emergency charges authorized in Ex parte 103.

Our findings herein are not to be construed as precluding reasonable groupings.

Respondents filed no formal application for fourth-section relief, but at the hearing they requested temporary relief to establish the rates over all reasonable routes, with the understanding that appropriate applications would be filed after the rates became effective. In those instances where it is required, temporary fourth-section relief from the long-and-short-haul provision of the Act for a period of six months will be granted. If within five months from the date of the establishment of the rates herein prescribed, application be filed in accordance with Rule XVIII of [fol. 13] our Rules of Practice for authority to continue any rates under fourth-section relief beyond the six months' period, such rates may be continued in effect until the application shall have been passed upon.

Appropriate orders will be entered.

Thereafter petitioners and other northern lines made effective within the States of Illinois, Indiana, Michigan and Ohio the scale of coke rates ordered by the Commission. In carrying out the orders of said Interstate Commerce Commission plaintiffs, by appropriate tariffs, published pursuant to law the rates prescribed by said Commission to be applicable to and from points in the States of Illinois, Indiana, Michigan and Ohio, and such rates became effective March 15, 1934. To give complete effect to the said orders of the Commission, plaintiffs, by concurrences as provided for by the rules and regulations of the said Interstate Commerce Commission, issued to the southern railroads connecting with these petitioners and serving coke manufacturing districts in Alabama, Tennessee and Virginia, and which said railroads with plaintiffs form and constitute the through routes to points of destination in the said States of Illinois, Indiana, Ohio and Michigan. Said concurrences required that the rates prescribed by the Commission from said origins in the South to said destinations in the states named be published and made effective. Pursuant to the terms of said concurrences the southern lines, by appropriate tariffs according to law, published said rates to become effective May 1, 1934, from Alabama and Tennessee origins, and August 3, 1934, from Virginia origins.

Upon petition asking for the suspension of said tariffs and concurrences filed with said Commission by the Illinois Central Railroad Company and other parties enumerated

in Paragraph IV of this bill of complaint, the said Commission did, before the effective date of said tariffs, sus-
[fol. 14] pend and make inoperative said rates for a period of six months, and thereupon entered upon an investigation of said rates in a proceeding designated as Investigation and Suspension Docket No. 3985. Thereafter, a hearing was held before an examiner of said Commission, and on March 11, 1935, the said Commission entered its report (208 I. C. C. 281) and order. By said report and order the said Commission found that the rates which had been published by said plaintiffs and their connections in compliance with and in pursuance of the orders of said Commission in I. & S. Docket 3511, dated June 30, 1933, had not been justified by plaintiffs, ordered the suspended schedules canceled without prejudice to the filing of new and lower schedules of rates in conformity with the bases of rates set forth in an appendix to the report as shown in Exhibit A attached hereto. Thereafter plaintiffs issued new concurrences requiring the publication of rates in conformity with the bases set out in the said appendix to the said report in accordance with the authority granted, and said southern lines published said rates effective May 2, 1936. Thereafter petitions were filed by the Illinois Central and other parties enumerated in Paragraph IV of this bill of complaint, asking the Commission to suspend the same. The said Commission, by its order dated April 30, 1936, served on plaintiffs May 1, 1936, in I. & S. Docket 4198, did suspend said schedules until December 2, 1936, but did not suspend the concurrences issued by complainants in conformity with the report and order of the Commission dated March 11, 1935. On the same date, to wit, April 30, 1936, and without further hearing, the said Commission entered its report and order prescribing an entirely different and lower basis of rates for application between said southern and northern points, requiring said plaintiffs to publish said rates to become effective on or before August 13, 1936, upon notice to the said Commission and to the general public by not less than thirty days, filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act. A
[fol. 15] copy of said report (215 I. C. C. 384) and order of April 30, 1936, served on plaintiffs May 12, 1936, is attached hereto, marked Exhibit B and made a part hereof, with like force and effect as though set forth in extenso herein.

That the rules and regulations of the said Commission provide that through rates via joint routes shall be established and maintained by all carriers between the points of origin and destination, pursuant to proper concurrences issued by all carriers to the joint routes to the carrier serving the point of origin and that it shall be the duty of said carriers to publish, according to law, the tariffs or schedules containing the applicable rates.

That as a result of the suspension by said Commission of the rates which it had ordered the plaintiffs to publish and maintain, in its order dated March 11, 1935, in Investigation and Suspension Docket 3985, plaintiffs were and are required to maintain rates for the transportation of coke from the South to the North which were and are in conflict, and at variance, with the lawfully published concurrences issued to the southern lines and filed with the said Commission.

VI

That the report and order of said Commission dated April 30, 1936, in Investigation and Suspension Docket 3985, was made without hearing, but on the petitions of several parties hereinbefore set out for reopening and reconsideration on the present record. That by its said report and order the said Commission prescribed and ordered the third successively lower basis of rates within a period of three years. In each of the three reports and orders heretofore enumerated and described the said Commission prescribed the basis of rates set out in the report as rea- [fol. 16] sonable maximum rates. That none of the rates prescribed was ever permitted to become effective, but the schedule published to become effective in conformity with the order in each instance was suspended and later followed by a report and order finding a different basis of rates proper and lawful and requiring plaintiffs and others to publish the same. That the rates prescribed in the third successive order, dated April 30, 1936, are materially lower than those prayed for by the petitioners before the Commission, and are materially lower than the basis which said petitioners before the Commission represented as a maximum reasonable basis of rates. That the basis of rates prescribed by the Commission in said orders are less than reasonable maximum basis of rates which the Commission is without lawful power or authority to prescribe.

VII

Plaintiffs allege that the Commission's said findings and orders are erroneous, invalid, unlawful and void for the following reasons:

1. Said orders and findings of the Commission are arbitrary and unjust, are contrary to the evidence of record and without support of any substantial evidence properly before the said Commission in the proceedings in which they are made, and said findings and orders are against the indisputable character of and the manifest weight of the evidence.

2. That the said orders prescribe and require plaintiffs to maintain rates which are less than reasonable maximum rates, which action of said Commission is arbitrary, unjust and without lawful authority.

3. That said orders of the Commission prescribe and order plaintiffs to publish and maintain rates which result in the undue preference of manufacturers and shippers lo- [fol. 17] cated in the South and undue prejudice of the manufacturers and shippers located in the North, which these carriers by the provisions of Section 3 of the Interstate Commerce Act are forbidden to publish and maintain.

4. That the third successive order entered by the Commission, dated April 30, 1936, was made without hearing, but only on petitions of southern carriers and shippers as aforesaid, is arbitrary and unjust, and is without any evidence to support it.

5. That in said report dated April 30, 1936, the Commission found, inter alia:

"The producers of coke in Official territory have no just ground for complaint against interterritorial rates in the South to central territory on the same level, mile-for-mile, as those they pay."

There is no substantial evidence before the Commission to support such finding, and said finding and conclusion is against the indisputable character of and the manifest weight of the evidence.

6. That in said report said Commission found, inter alia:

"If interterritorial rates higher than column 2 rates were warranted, as the central carriers contend, because of more

difficult operating conditions in the South, it would be proper that the increment accrue solely to the southern carriers. The carriers in central territory are entitled only to maximum reasonable compensation for the service they perform, which will be afforded them by the prescription of the column 2 rates."

There was no substantial evidence before the Commission showing or tending to show that joint through interterritorial rates in connection with the southern carriers on the same basis as is applicable within central territory would yield to the central territory carriers, plaintiffs [fol. 18] herein, the maximum reasonable compensation for the services they perform in the transportation of coke from the point of connection or junction with the southern carriers, or the same measure of compensation as they receive on coke transported by them between points in central territory.

In making such finding the Commission proceeded upon the erroneous assumption and misapprehension that joint line transportation is required in central territory as it is in every instance from southern origins to central territory destinations, and that the joint through rates would be divided either on a mile-for-mile basis between the southern carriers and the central territory carriers, plaintiffs herein, or on a basis which would yield to the plaintiffs the same earnings as they obtain for transporting coke on their own lines within central territory.

In making said finding the Commission gave consideration to, and based its conclusion that the basis it prescribed in said order of April 30, 1936, would be a reasonable maximum basis of rates, on the element of an assumed division of the joint through rates without hearing and without any evidence showing or tending to show what the division of the joint through rates between the southern and central carriers was or would be.

7. There was no substantial evidence before the Commission showing or tending to show that the basis or scales of rate prescribed in said orders applicable to the transportation of coke from the South to central territory would be reasonable maximum bases of rates, or that the basis of rates prescribed by the Commission in Investigation and Suspension Docket 3511, aforesaid for application from

southern origins to central territory exceeds reasonable maxima.

8. There are no findings of facts or changed facts to support the conclusion of the Commission that the basis pre-
[fol. 19] scribed and ordered to become effective for the transportation of coke from the South to central territory in the order of the Commission in Investigation and Suspension Docket 3511, dated June 30, 1933, had become unreasonable on March 11, 1935, and that the basis prescribed and ordered to become effective in its report and order in Investigation and Suspension Docket 3985, dated March 11, 1935, had become unreasonably high on April 30, 1936.

9. That the Commission proceeded under erroneous constructions of law and misapprehensions in respect of its powers thereunder in requiring and ordering these plaintiffs to join the southern lines in rates which are less than maximum reasonable rates for the sole purpose of enabling the said southern carriers to better meet competition in the North.

10. That the Commission proceeded under erroneous constructions of the law and misapprehensions of its powers thereunder in that instead of testing the rates by the standards ordinarily employed by said Commission, they were tested solely by the level of the rates applicable within the North and the expressed desires of the southern producers and carriers for the same level of rates from the South to the North for competitive reasons.

11. That the Commission proceeded under erroneous constructions of the law and misapprehensions with respect to its powers thereunder in assuming to prescribe compelled subnormal competitive rates as reasonable maximum rates, in order to enable southern shippers to meet assumed commercial exigencies.

12. That the Commission proceeded under erroneous construction of the law and misapprehensions of its powers thereunder in assuming to equalize disadvantages of geographical locations, opportunities, fortunes or abilities in prescribing rates from the South to central territory.

[fol. 20] VIII

The third successive order, dated April 30, 1936, which is one of the orders here sought to be enjoined, vacated

and set aside, requires that plaintiffs and others establish the rates set out in the appendix of said report, on or before August 13, 1936, upon thirty days' notice of filing and posting as required by law. Plaintiffs are without adequate remedy at law and in need of equitable relief, for unless they comply with said order within the time fixed they will be subject to innumerable suits and prosecutions instituted by the officers of defendants, unless restrained by this honorable court. The officers of the defendants, unless restrained by this honorable court before the time fixed for compliance, will institute innumerable actions against these plaintiffs to recover fines and penalties, and subject the officers and employes of said plaintiffs to innumerable arrests, suits, fines and imprisonments. On the other hand, if your petitioners, in order to avoid liability for suits, penalties and prosecutions, under duress publish and establish the rates specified in said order of said Commission, they will be required to collect those rates and no others; so that unless the said order is enjoined, set aside, suspended and annulled, and if pending final determination herein its enforcement is not temporarily enjoined and suspended, plaintiffs will suffer irreparable damage and injury for which they will be without adequate remedy or protection at law, since the revenue lost by the reduced rates cannot be recovered by plaintiffs in any future proceeding as there is no provision in the statutes of the United States authorizing a recovery from shippers for transportation services performed under rates prescribed by the Commission and subsequently found to be unreasonably low and the order of said Commission vacated and set aside.

[fol. 21] All of the matters herein alleged, plaintiffs offer to prove.

Wherefore plaintiffs, and each of them, pray:

1. That upon the filing of this petition the presiding judge of this court shall call to his assistance in the hearing and determination thereof two other judges, of whom at least one shall be a circuit judge.

2. That process may issue against the defendants, United States of America and Interstate Commerce Commission, and that after not less than five days' notice to

the Interstate Commerce Commission and to the Attorney General of the United States as provided in the statutes, a temporary injunction be issued staying and suspending the said orders of said Commission dated March 11, 1935, and April 30, 1936.

3. That upon final hearing of this cause a permanent injunction issue, decreeing that said orders of said Commission as aforesaid are null and void and be set aside, annulled and suspended, and their enforcement, execution and operation be forever enjoined, and that the United States of America and the said Interstate Commerce Commission be restrained from taking any steps or instituting or further prosecuting any proceeding to enforce the said orders.

[fol. 22] 4. That such other and further relief as may be proper in the premises be granted to plaintiffs.

Respectfully submitted, Elmer L. Beach, Leo P. Day, Anthony P. Donadio, John C. Kauffman, Andrew P. Martin, Guernsey Orcutt, Marion B. Pierce, B. G. Stackhouse, L. H. Strasser, W. J. Stevenson, D. Lynch Younger, Solicitors for Plaintiffs.

[fol. 23] *Duly sworn to by L. E. Oliphant. Jurat omitted in printing.*

[fol. 24] EXHIBIT "A" TO COMPLAINT

20268.

Interstate Commerce Commission

Investigation and Suspension Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

Submitted December 6, 1934. Decided March 11, 1935

Proposed rates on coke from Birmingham, Ala., Chattanooga, Tenn., and points in Wise County, Va., to destinations in central and Illinois territories found not justified. Suspended schedules ordered canceled without prejudice to the filing of new schedules in conformity with the views expressed herein.

L. P. Day, Guernsey Orcutt, Charles P. Reynolds, L. R. Hall, M. G. Roberts, J. I. Bonner, E. D. Mohr, E. R. Roby,

Charles Clark, A. L. Holton, R. T. Wilson, Roy S. Kern, A. P. Donadio, and W. A. Northcutt for respondents.

F. A. Doebber, John Long, John H. Wilharm, John B. Keeler, W. W. Collin, H. A. Hollopeter, O. R. Livinghouse, A. B. Cronk, D. L. Bennett, and R. B. Coapstick, interveners in support of respondents.

J. V. Norman, A. J. Ribe, and C. E. Widell for protestants.

Report of the Commission

By the COMMISSION:

By schedules filed to become effective May 1 and August 3, 1934, respondents proposed to increase the rates on coke from the Birmingham, Ala., district, hereinafter referred to as Birmingham, and from origins on the Louisville & Nashville Railroad Company and the Interstate Railroad Company, hereinafter referred to as the Louisville & Nashville and the Interstate, in Wise County, Va., and to make reductions and increases in rates from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan. Operation of the schedules was suspended on protests by southern carriers and shippers. The schedules canceling the concurrences became effective December 1, 1934. Rates will be stated in amounts per net ton.

In Coke Between Points in Central and Illinois Territories, 194 I. C. C. 640, and complaint cases consolidated therewith, division 4 prescribed, inter alia, two distance scales set forth in appendix 8 thereto: One, hereinafter designated column 2 rates, for application between points in central territory, including Illinois but not zone C in Michigan, and the other, hereinafter designated column 3 rates, for application from points in central territory to [fol. 25] destinations in zone C in Michigan and zone I in western trunk-line territory, and from Alabama City, Holt, Woodward, and Dolcito Junction, Ala., to destinations in central territory. Alabama City and Holt, which generally take the same rates as the Birmingham district, are 67 miles east and 55 miles west, respectively, of Birmingham. No coke is now manufactured at either of those points. Woodward and Dolcito Junction are in the Birmingham district. The reasonableness of the rates from Wise County, Chattanooga, or any other southern origin, except the four Alabama cities named above was not in issue and no finding was made relative thereto.

The column 3 rates are approximately 10 per cent higher than the column 2 rates. The column 2 rates average about 16.6 per cent of the eastern first-class rates and the column 3 rates for distances beyond 300 miles range from 12.8 to 13.3 per cent of the southern first-class rates. The column 3 rates from Chattanooga to 20 destinations in central territory average 13.15 per cent, and from Birmingham to the same destinations, 13.06 per cent of the first-class rates.

Complaints embraced in Coke Between Points in Central and Illinois Territories, supra, on behalf of complainants located in central territory, alleged that the rates from Birmingham, Chattanooga, Harlan County, Ky., and Wise County, to central territory, were unduly preferential of shippers from those points and unduly prejudicial to shippers within central territory, and complainants in southern territory alleged that the rates from Chattanooga were unduly preferential of that point and prejudicial to Birmingham. Division 4 recognized that Chattanooga had a rate advantage over Birmingham, but found that the evidence was insufficient to support a finding of undue prejudice. It expressed the belief that rates made on the basis of the prescribed scales would remove any undue prejudice that existed.

Many of the central-territory carriers and shippers interpreted the report as setting forth the views of division 4 as to the proper bases for rates within central territory and from all origins in southern territory to central territory.

On March 15, 1934, the column 2 rates were made effective between nearly all points in central territory. There are three principal exceptions. Intrastate in Ohio the scale prescribed by the State commission applies. That scale is slightly lower up to 40 miles, and the same beyond that distance as the column 2 rates. The Illinois carriers have not as yet published the column 2 rates, contending that the rates now in effect were established since the decision in Coke Between Points in Central and Illinois Territories, supra, was rendered and that they do not differ sufficiently [fol. 26] from the column 2 rates to warrant the expense of publishing new tariffs. It will be their purpose to establish the column 2 rates the first time new tariffs are published. About 57 short-haul rates, mostly for distances under 30 miles, lower than column 2 rates, have been estab-

lished in central territory to meet truck competition.

The column 2 rates resulted in both increases and reductions in central territory. For 50 alleged representative hauls increases ranged from 1 cent to 53 cents. An exhibit introduced by the manufacturers of coke at Terre Haute, Ind., shows that from Terre Haute to 50 destinations in Illinois, 33 in Indiana, and 19 in Michigan, which includes all cities with a population of 10,000 or more, there were 45 increases ranging from 1 cent to 35 cents, averaging 17.2 cents, and 50 decreases ranging from 2 cents to 40 cents, averaging 10.9 cents. An exhibit introduced by a representative of the Birmingham shippers shows that from Ashland, Ky., said to be representative of origins in southern Ohio, to 76 destinations in Illinois, Indiana, Ohio, and Michigan, there were 14 increases ranging from 3 to 38 cents averaging 13.6 cents, and 62 reductions ranging from 2 to 79 cents, averaging 32.9 cents.

The southern carriers complied literally with the findings of division 4. They reduced all rates from Birmingham that exceeded the column 3 rates, and, in order to eliminate fourth-section departures, rates from Chattanooga that exceeded the rates made applicable from Birmingham were made the same as the latter. They made no other changes in the rates from Birmingham, Chattanooga, or Wise County. No increases were made in any rates from southern origins.

Pressure was brought to bear on the carriers in central territory by producers therein to increase the rates from southern origins to central territory to the column 3 basis. The southern carriers were opposed to such increases and refused to make them. In order to compel them to do so, the central carriers restricted their concurrences to rates that were no lower than those which would result from a strict application of the column 3 rates.

The carriers in Illinois territory that served southern origins or have direct connections with such carriers, and the western trunk-line carriers operating in Illinois and Indiana, such as the Illinois Central Railroad Company, the Chicago & Eastern Illinois Railway Company, the Chicago & North Western Railway Company, and the Chicago, Burlington & Quincy Railroad Company, did not cancel their general concurrences, and the suspended schedules do not propose to establish the column 3 rates over such routes. [fol. 27] The result is that, if the suspended schedules are

found justified, rates to some points in Illinois and Indiana, including Chicago, will be available, that are lower over some routes than others. For example, the rate from Chattanooga to Chicago over the Illinois Central Railroad Company will be $4.16 and over other routes $4.55.

The southern carriers admit that, considering transportation conditions in southern territory as a whole, rates must be higher than in official territory to produce the required revenue. This they claim is due to a lower volume of traffic, on the whole, rather than to operating difficulties. The traffic in question moves over the main lines of carriers reaching the Ohio River over which all traffic moving via the Ohio River gateways from the South to central territory and the Northwest is handled. The traffic density on such lines is materially greater than that in the South as a whole. The revenue net tons per mile of road transported by the Cincinnati, New Orleans & Texas Pacific Railway Company, which terminates at Chattanooga and Cincinnati, exceeded that handled by such carriers as the Pennsylvania Railroad Company, the Baltimore and Ohio Railroad Company, the New York Central Railroad Company, and the Wabash Railway Company, and the average handled by all lines operating in central territory, except those which extend into western trunk-line, southwestern, and southern territories. The southern shippers contend that, in determining rates on a low-grade commodity, such as coke, more weight should be given to the traffic density on the routes over which it actually moves than to that in the southern territory as a unit.

With the exception of the Louisville & Nashville and the Interstate, the southern carriers propose the column 2 rates from all southern origins. They assert that such rates will be less than maximum reasonable rates but within the zone of reasonableness. The Louisville & Nashville and the Interstate admit that some of their rates are less than maximum reasonable rates, but contend that they were established to move coke and should not be disturbed. The following table shows the present rates from Chattanooga and Birmingham to representative destinations, and what the rates would be if made on the basis of the column 2 and column 3 rates. It also shows to which points named reductions were made March 15, 1934, and the amount of such reductions:

[fol. 28]

To—	From Chattanooga				From Birmingham				Reduction Mar. 15, 1934
	Distance Miles	Present rate	Col. 2 rate	Col. 3 rate	Distance Miles	Present rate	Col. 2 rate	Col. 3 rate	Cents
Detroit, Mich	591	$3.65	$4.15	$4.55	734	$4.65	$4.55	$5.00	....
Battle Creek, Mich	592	4.16	4.15	4.55	697	4.90	4.45	4.90	1
Grand Rapids, Mich	635	4.16	4.25	4.70	740	4.91	4.55	5.00	....
Jackson, Mich	583	3.91	4.05	4.45	696	4.90	4.45	4.90	1
Cleveland, Ohio	576	4.28	4.05	4.45	719	5.00	4.55	5.00	[1] 101
Columbus, Ohio	452	3.28	3.65	4.00	595	4.40	4.15	4.55	....
Springfield, Ohio	417	3.28	3.45	3.80	560	4.28	3.95	4.35	....
Dayton, Ohio	392	3.28	3.35	3.70	535	4.28	3.95	4.35	....
Kokomo, Ind	502	3.91	3.85	4.15	556	4.30	3.95	4.35	....
Richmond, Ind	403	3.65	3.45	3.80	530	4.30	3.85	4.35	....
Michigan City, Ind	574	4.16	4.05	4.45	640	4.50	4.25	4.70	....
Fort Wayne, Ind	495	3.91	3.75	4.15	600	4.50	4.15	4.55	....
Chicago, Ill	594	4.16	4.15	[2] 4.55	645	4.30	4.25	[2] 4.70	....
Peoria, Ill	558	4.30	3.95	[2] 4.35	605	4.55	4.15	[2] 4.55	7
Kankakee, Ill	545	4.16	3.95	[2] 4.35	595	4.30	4.15	[2] 4.55	....

[1] Previous rate was combination.

[2] Present rate will be available over carriers that did not restrict concurrences.

In publishing the suspended schedules, respondents, in order to conserve time and labor, obtained from the coke shippers the names of the destinations to which they had made, or probably would make, shipments, and published rates only to those points. Consequently, rates are published in the suspended schedules from Chattanooga to only 20 points in Michigan, 18 in Ohio, 14 in Indiana, and 15 in Illinois. The averages of the rates to those points, if made on the basis of the column 2 rates, would be, to the Michigan points 100 per cent, to the Ohio points 102 per cent, to the Indiana points 92 per cent, and to the Illinois points 97 per cent of the average of the present rates. The averages of the suspended column 3 rates are, to the Michigan points 110 per cent, to the Ohio points 113 per cent, to the Indiana points 102 per cent, and to the Illinois points 106 per cent of the average of the present rates.

Next below is shown a recapitulation of a revenue test, based on all shipments of coke moved during 1933 from Birmingham to the Ohio River crossings and points beyond in the four States named:

To—	Weighted-average distances		Freight revenue under rates				
	Southern [1]	C. F. A. [2]	Tons shipped	Prior to Mar. 15, 1934	Effective Mar. 15, 1934	Under column 2	Under column 3
Ohio River crossings	404	...	14,452.05	$44,589.28	$44,589.28	$49,662.11	$54,878.75
Illinois	345	260	79,954.10	348,471.34	345,305.52	335,312.70	370,066.14
Indiana	387	217	11,801.00	52,597.25	52,511.05	48,748.95	53,812.49
Michigan	398	390	17,725.75	91,111.35	90,910.48	82,482.31	91,734.44
Ohio	481	125	4,444.45	19,529.98	19,408.27	18,431.01	20,289.09
Totals:							
Excluding Ohio River	[3] 363	[3] 270	113,925.30	511,709.92	508,135.32	484,974.97	535,902.16
Including Ohio River	[3] 368	[3] 240	128,377.35	556,299.20	552,724.60	534,637.08	590,780.91

[1] Within southern territory.

[2] Within Central Freight Association territory.

[3] Average distances.

[fol. 29] Similar data are given next below as to a traffic test based on all coke shipments made from Chattanooga during 1929.

To—	Tons shipped 1929	Revenue under rates		
		Prior to Mar. 15, 1934	Under column 3	Under column 2
Ohio River crossings	7,424.10	$19,228.42	$24,867.57	$22,640.34
Illinois	549.15	2,564.52	2,534.66	2,304.34
Indiana	2,037.45	8,427.46	8,819.90	8,011.14
Michigan	49,039.15	183,181.83	223,368.28	203,587.99
Ohio	3,832.45	12,570.43	16,395.54	14,887.60
Totals:				
Excluding Ohio River	55,458.20	206,744.24	251,118.38	228,791.07
Including Ohio River	62,882.30	225,972.66	275,985.95	251,431.41

Only beehive coke is manufactured in Wise County. The tonnage shipped to central territory from origins on the Louisville & Nashville is not shown. During 1923, 2,599 tons moved from origins on the Interstate to such destinations. The rates from Wise County are not on any consistent basis. For example, a $3.96 rate applies for distances ranging from 407 to 705 miles. Using the distances from Appalachia, Va., the column 2 rates to 40 destinations in central territory would result in 15 increases, ranging from 1 to 51 cents, and 25 reductions, ranging from 3 to 77 cents, and the column 3 rates would result in 31 increases, ranging from 4 to 87 cents, and 9 reductions, ranging from 3 to 16 cents. Using 37 of the exhibited rates, the present rates average $3.76 and the column 2 and 3 rates would average $3.69 and $4.07 respectively. No revenue test based on the tonnage from Wise County was made.

The only plants producing by-product coke in the South are at Chattanooga and Birmingham. The coke manufactured is designated furnace, foundry, industrial, and domestic coke, and differs only in size. No furnace coke is shipped from either origin to the North. About 5 per cent of the tonnage moving from Chattanooga to centr. territory is foundry coke, and the bulk of the remainder is domestic coke. Testimony dealing with commercial factors was introduced as to one plant only in Birmingham. About 66⅔ per cent of its shipments to central territory consists of foundry coke and the remainder of domestic coke. Foundry coke sells for more than domestic coke. The cost of production in the South is not shown but it has increased considerably since October 3, 1933. The Chattanooga manufacturer has fixed $3.50 on domestic coke, and $5 on foundry

coke as the lowest price it can afford to accept on cars at Chattanooga. Its maximum prices are $4.50 and $6, respectively. The Birmingham manufacturers' minimum oven [fol. 30] prices are $3.50 on domestic coke, except that it accepts $3.45 on domestic coke destined to Chicago, and $4.50 on foundry coke.

The selling prices of coke in central territory are fixed by nearby producers. There is considerable sales resistance against southern coke even when it is offered at the prevailing market price, because it is inferior to some of the coke produced in central territory and because it is not available for quick delivery. Consequently, the southern manufacturers sell at points in central territory only when the market prices do not exceed their minimum oven prices plus the freight rates. Neither the Chattanooga nor Birmingham manufacturer has ever been able to ship to all destinations in central territory. The Chattanooga shipper has never been able to sell at Cleveland or points in eastern Ohio. Its principal markets are Chicago, Detroit, and points in southern Michigan, and the territory intermediate thereto. The Birmingham manufacturer has never been able to sell domestic coke in Michigan or Ohio, and only to a limited extent in Indiana. It sells some foundry coke at points in Michigan and western Ohio, but its best markets are in Indiana and Illinois. Prices of coke vary at the different points in central territory due largely to their distance from by-product plants, which have largely supplanted beehive ovens. The prices also differ from time to time, usually advancing during the winter. The only information given us as to such prices is that in September 1934 nut and egg coke at Detroit sold for $5.75 and $6.25 respectively. The Chattanooga manufacturer says he can ship to Detroit only when maximum prices prevail.

The rates on coke from Chattanooga, Birmingham, and Wise County to southern destinations are both lower and higher than the column 2 scale, but they average about the same. The averages of the present and column 2 rates, respectively are, from Birmingham to 6 Virginia destinations $4.46 and $4.37, to 30 North Carolina destinations $3.83 and $3.82, to 20 South Carolina destinations $3.40 and $3.32, to 27 Georgia destinations $2.56 and $2.60, to 20 Tennessee destinations $2.56 and $2.66, to 15 Alabama destinations $1.86 and $1.86, to 14 Mississippi destinations $2.55 and $2.64, to 2 Louisiana destinations $2.93 and $3.30,

to 5 Florida destinations $3.16 and $3.09, and to 18 Kentucky destinations $3.11 and $3.16. The average present rate to all those destinations is $3, and the average column 2 rate $3.02. From Chattanooga to the same destinations the averages of the present and column 2 rates, respectively, are, to Virginia $4 and $3.97, to North Carolina $3.63 and $3.49, to South Carolina $3.34 and $3.20, to Georgia $2.55 and $2.58, to Tennessee $2.08 and $2.30, to Alabama $2.16 and $2.35, to Mississippi $3.02 and $3.27, to Louisiana $3.18 and $3.85, to Florida $3.37 and $3.49, to Kentucky [fol. 31] $2.74 and $2.75, and to all destinations $2.91 and $2.91. From Chattanooga and Birmingham combined, to all of the above destinations, both the present and the column 2 rates average $2.96. The destinations used embrace all cities having a population of over 5,000.

On all coke shipments moving from Birmingham during 1933 to all points in southern territory, except those on the Ohio River and in the peninsula of Florida, the total freight charges under the present rates were $603,037.82, and under the column 2 rates they would have been $642,515.51, or 6.55 per cent more. Coke shipments from Chattanooga to southern destinations during 1933 totaled 63,648 tons and moved to 58 destinations; the charges at the present rates were $121,835.75; and on the basis of the columns 2 and 3 rates they would have been $142,838.85 and $154,239.10, respectively. The average weighted haul of the shipments referred to was 175.7 miles and the average weighted rates on the three bases referred to above are shown as $1.91, $2.24, and $2.42 respectively.

Division 4, in Coke Between Points in Central and Illinois Territories, supra, stated:

> We have recognized in numerous cases that from a rate-making standpoint southern territory is rated higher than central territory. The evidence of record indicates that the traffic density in the former is substantially less than in the latter. Where we have prescribed interterritorial rates that did not reflect this difference, special circumstances surrounding the traffic accounted for the exception.
>
> * * * * * * *
>
> It is true that the traffic density on the Louisville & Nashville and the Cincinnati, New Orleans & Texas Pacific, which haul a large portion of this traffic, compares favorably with

that on lines in central territory. But in fixing interterritorial rates due consideration must be given to the adjustment as a whole, else by piecemeal revision the whole structure will be undermined. The objective must be such uniformity as will be conducive to the widest competition among shippers in a given territory, and the preservation of carrier revenue predicated upon recognized differences in territorial rate levels. Rates made to correspond closely to traffic density on particular lines would render impossible the achievement of this result.

The above pronouncement is sound as a general proposition, but we do not believe it should be applied here. Coke is shipped to central territory only from a few southern origins and moves only over main arteries on which the traffic density is much heavier than that in the southern territory as a whole. The entire adjustment, to the extent that it is of interest to manufacturers or shippers of coke in southern and central territories, is before us, and there is no contention that the column 3 rates are necessary to preserve the carriers' revenues. On the contrary, the southern carriers are convinced that the column 3 rates would restrict, if not prevent, the movement of southern coke to [fol. 32] central territory, and the evidence of the Chattanooga and Birmingham manufacturers is to the same effect. Under the circumstances the consideration of transportation conditions may well be confined to those actually encountered.

The rates on coke within the South are no higher than those in central territory. A revision is contemplated, but the witnesses for the southern carriers express the belief that they will not be able materially to increase the average level of the present rates.

We have frequently recognized that the transportation burden is differently distributed in official and southern territories and that, on some low-grade commodities, rates may justly be relatively lower in the South than in official territory, notwithstanding the less favorable transportation conditions. The southern interests contend that there is no justification for interterritorial rates on coke that are higher than the rates in either the origin or destination territory. We have, in several cases where competitive conditions are somewhat analogous to those here presented, prescribed rates from origins in western trunk-line and

southern territories to official territory on the basis of the same scales that applied in official territory. American Distilling Co. v. A. C. & Y. Ry. Co., 140 I. C. C. 633; Newsprint Paper Investigation, 197 I. C. C. 738.

Traffic density affects cost of operation and is one of the factors that, together with other transportation conditions, must be given consideration. We cannot accept as sound protestants' contentions that competitive conditions are paramount and controlling to the extent that we may disregard other matters usually considered in determining the reasonableness of rates.

The evidence as to transportation conditions actually encountered in southern territory by the traffic here under consideration is not sufficiently comprehensive and definite to warrant us in finding that the rates made on the column 2 basis are full maximum reasonable rates, but we are convinced that joint rates made by applying the column 2 scale from origins to destinations, and adding thereto reasonable arbitraries as set forth in the appendix for hauls in southern territory, are and for the future will be maximum reasonable rates. In applying the scales and arbitraries distances should be computed over the shortest possible routes by existing connections for the interchange of carload traffic without transfer of lading. Specific point-to-point rates should be published, but our conclusions are not to be construed as precluding reasonable groupings or the equalization of rates through the Ohio River crossings.

There is no evidence of record that tends to support the contention of the central-territory carriers that rates from the South to central territory lower than the column 3 rates [fol. 33] are unduly prejudicial to shippers in central territory and unduly preferential of the southern shippers. The average haul in central territory is 100 miles. Before the southern shippers can reach central territory they have to pay for hauls of 311 miles from Chattanooga and 330 to 481 miles from Birmingham to the Ohio River. There is no merit in the contention that so long as the rates in official territory are on a maximum reasonable level the rates from the South to central territory must also be on a maximum reasonable level in order to prevent undue prejudice and preference. The law is correctly stated by division 5 in American Sugar Refining Co. v. Chicago, B. & Q. R. Co., 169 I. C. C. 557, in which it said:

Distance and cost of service are not the sole criterions to be considered in determining whether rates are unduly prejudicial. The law does not contemplate that all rates shall be on the same level, different only to the extent justified by distance and cost of service. Its intent is to give the carriers some latitude in fixing rates. It is their province to take into consideration commercial competition and any other facts or circumstances affecting their prosperity. Their prosperity is dependent on the welfare of the communities and persons they serve, and they may maintain rates less than maximum reasonable rates and rates lower than we can lawfully prescribe, so long as they do not unduly prejudice other communities or shippers, or unduly burden other traffic. Preferences and prejudices are not prohibited unless they are undue. To be undue they must be a source of advantage to the party or locality alleged to be favored, and a detriment to the other party or locality. The question, whether they are undue, is one of fact, to be determined by us after consideration, not only of relative distances and transportation conditions, but of all matters which carriers, apart from any question arising under the statute, would treat as calling for a preference or advantage. Texas & Pacific Ry. Co. v. I. C. C., 162 U. S. 197.

Rates on coke from the South to points in central territory, on the basis of the column 2 rates, would not be unduly prejudicial to shippers of coke within central territory or unduly preferential of southern shippers.

We find that the suspended schedules have not been justified. An order will be entered requiring their cancelation, without prejudice to the filing of new schedules in conformity with the views expressed herein. The findings and order in Coke Between Points in Central and Illinois Territories, supra, insofar as they are inconsistent with the views expressed herein, are hereby modified to that extent. The outstanding order in that proceeding will be modified accordingly.

TATE, Chairman, concurring in part:

I give an affirmative vote for the foregoing report, notwithstanding that I do not approve it in its entirety. It results, in my opinion, in an interterritorial rate situation

which is a great improvement over the rates fixed on this commodity from certain points in southern territory to [fol. 34] points in official territory in Coke between Points in Central and Illinois Territories, 194 I. C. C. 640, and related cases, particularly as the arbitraries fixed in the instant report are only permissive, and are lower than those fixed in the case last cited, the ones here involved stopping at the border of the higher-rated territory. The improvement is emphasized in the discussion which denies the contention of the carriers in the lower-rated territory, that since they charge the highest rates within the maximum of reasonableness, they and the shippers in that territory would be prejudiced unless the carriers in the higher-rated territory were required to charge the highest rates within the maximum of reasonableness. However, I do not believe there is a justification in the record in this case for the adding of any arbitraries at all on this commodity, since the commodity now moves within the higher-rated territory at rates no higher than those charged in the lower-rated territory and said present moving rates are approximately those of column 2 fixed in the report, in some instances slightly lower than those in column 2. I think no arbitraries should be added above the column 2 rates. However, in view of the discussion above referred to, I construe the report as not only fixing the arbitraries as merely permissive, but also as carrying an announcement that, if the arbitraries are not added, nevertheless column 2 rates will not be considered in this case as prejudicial to the carriers or shippers in the lower-rated territory, and that said carriers will be expected to give concurrences to schedules published which would apply column 2 rates for the entire distance of the haul. Hence my approval of the report in its major part.

I am authorized to state that Commissioner McManamy joins in this expression.

LEE, Commissioner, concurring:

In this proceeding we are again called upon to consider an interterritorial rate situation, the proper adjustment of which is of great importance. I have voted for the report because it prescribes a fairer adjustment than that prescribed by division 4. However, I do not entirely agree with the theory on which the report is written.

We have a number of times pointed out that, due to their largely independent development, the rate structures in the several rate territories are materially different in that class and commodity rates perform to a large extent different functions in each and are differently related to the respective general rate levels. In official territory the class rates have applied not only on less-than-carload traffic but also on a great part of the carload traffic. Commodity rates have constituted a minor part of the structure. In southern terri- [fol. 35] tory the reverse has been true and most of the carload traffic has moved on commodity rates. In revising the class rates in these two territories we accorded considerable weight to the history of the then existing rate structures, and to the part played by the class rates, with the result that the class rates in southern territory were placed on a much higher level than those in official territory, the level of the former averaging about 139 per cent of that of the latter.

An entirely different situation has existed in connection with commodity rates within these two territories. Within the South many of the commodity rates, applying on articles which move in substantial volume, have been and now are on the same level as, or a lower level than, the rates on the same articles within official territory. A somewhat similar interterritorial situation has existed. In the past the northern lines have joined with the southern lines in establishing joint commodity rates on about the level of, or even lower than, those in effect within the North for the movement to important consuming areas therein of various articles produced in the South. Such interterritorial rates have been responsible in a large measure for the industrial expansion of the South. While consumption kept pace with production there was little objection to these rates, but with the decline in consumption and other economic changes northern producers commenced to complain of the movement of competitive articles into the North at these rates. As a result of such complaints and in order to confine the movement to the greatest possible extent to traffic produced at points on their own lines, the northern carriers began to insist that interterritorial rates reflect to a greater extent the higher general, class and commodity, rate level prevailing within the South. Here they not only demand that a car of southern coke bear a higher rate than that

of a car of northern coke for the haul north of the Ohio River, but they also would require that the car from the South move to the river at a higher level than that prevailing on coke within the South. The southern carriers desire to establish or continue interterritorial rates on this commodity on about the same level as those prevailing in central territory. They urge that such an adjustment is necessary to permit the free movement of the traffic.

We have repeatedly expressed the view that carriers are free to establish and maintain less than maximum reasonable rates so long as they do not fall below a minimum reasonable level and do not result in undue prejudice or preference. The column 2 rates clearly meet these tests. They are, in fact, the maximum reasonable level within central territory and, as found in the report, would not result in undue prejudice to shippers in the North or undue preference of shippers in the South. If the southern carriers desire to forego the benefit of higher rates, reflecting the general [fol. 36] southern rate level, for the lower central territory basis the northern lines have no just ground for refusing to join therein. All that they are entitled to demand is fair and reasonable compensation for the service they perform. It would seem, therefore, that they may not lawfully insist, against the wishes of the interested southern lines, that interterritorial rates be higher than the rates which they themselves maintain. Nor does it appear that northern shippers have any just ground for complaint against a rate adjustment which will permit their southern competitors to ship into the North on the rate level prevailing therein. The maintenance of a rate adjustment which will permit the free movement into official territory of articles produced in other sections of the country is of vital public importance. We should not permit any group of carriers so to dominate an interterritorial rate adjustment as to dictate the sources from which important consuming areas served by them may be supplied.

SPLAWN, Commissioner, concurring:

I concur in the finding that the rates proposed by respondents are not justified to the extent they exceed rates made in accordance with the formula suggested. I concur also in the finding that upon the record before us rates from the southern origin points to destinations in central territory

lower than the column 3 rates described in the report are not unduly preferential of southern shippers, nor unduly prejudicial to shippers in central territory.

I am of the opinion, however, that we should also find that rates suggested by the southern carriers lower than those which would result from the application of the formula would not be unlawful for application from the southern origins to central territory.

Appendix

Arbitraries which may be added for hauls in southern territory

	Cents		Cents
20 miles and under	10	260 miles and over 240	26
30 miles and over 20	11	280 miles and over 260	27
40 miles and over 30	12	300 miles and over 280	28
50 miles and over 40	13	320 miles and over 300	29
60 miles and over 50	14	340 miles and over 320	30
70 miles and over 60	15	360 miles and over 340	31
80 miles and over 70	16	380 miles and over 360	32
100 miles and over 80	18	400 miles and over 380	33
120 miles and over 100	19	425 miles and over 400	34
140 miles and over 120	20	450 miles and over 425	35
160 miles and over 140	21	475 miles and over 450	36
180 miles and over 160	22	500 miles and over 475	37
200 miles and over 180	23	530 miles and over 500	38
220 miles and over 200	24	560 miles and over 530	39
240 miles and over 220	25		

[fol. 37] Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 11th day of March, A. D. 1935.

Investigation and Suspension Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

It appearing, That by order dated July 30, 1934, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until December 1, 1934, and March 3, 1935;

It further appearing, That a full investigation of the matters and things involved has been had, and that the Commission has, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules, on or before May 1, 1935, upon notice to this Commission

and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that this proceeding be discontinued.

It is further ordered, That the orders heretofore entered in Investigation and Suspension Docket No. 3511, Coke Between Points in Central and Illinois Territories, reported in 194 I. C. C. 641, and the complaint No. 22052, Alabama By-Products Corp. et al. v. Louisville & Nashville Railroad Company et al., consolidated with and disposed of in the report immediately before referred to, be, to the extent that they require establishment and maintenance of rates on coke, in carloads, from origins in Alabama to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan which are higher than those approved in the report made part hereof for application from and to the same points, and they are hereby, vacated and set aside.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 38] EXHIBIT "B" TO COMPLAINT

21148.

Interstate Commerce Commission

[fol. 39] Investigation and Suspension Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

Decided April 30, 1936

Upon reconsideration, finding in prior report, 208 I. C. C. 281, that proposed rates on coke from Birmingham, Ala., Chattanooga, Tenn., and points in Wise County, Va., to destinations in central and Illinois territories have not been justified, affirmed, and reasonable rates for the future prescribed.

Appearances same as in original report.

Report of the Commission on Reconsideration

By the COMMISSION:

In the prior report, 208 I. C. C. 281, we had under consideration schedules filed to become effective May 1 and Au-

gust 3, 1934, by which respondents proposed to increase the rates on coke from the Birmingham, Ala., district, hereinafter referred to as Birmingham, and from origins on the lines of the Louisville and Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., and to make reductions and increases in rates from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan. We found that the proposed rates had not been justified, and subsequently ordered the establishment of the rates approved in the report. On petitions of several protestants the proceeding was reopened for reconsideration on the present record. Only such essential facts are repeated here as are deemed necessary. Rates stated herein are per net ton.

In Coke Between Points in Central and Illinois Territories, 194 I. C. C. 640, and complaint cases consolidated therewith, division 4 prescribed, inter alia, two distance scales set forth in appendix 8 thereto: One, hereinafter designated column 2 rates, for application between points in central territory, including Illinois but not zone C in Michigan; and the other, hereinafter designated column 3 rates, for application from points in central territory to destinations in zone C in Michigan and zone I in western trunk-line territory, and from Alabama City, Holt, Woodward, and Dolcito Junction, Ala., to destinations in central territory. Alabama City and Holt, which generally take the same rates as the Birmingham district, are 67 miles east and 55 miles west, respectively, of Birmingham. No coke is now manu- [fol. 40] factured at either of those points. Woodward and Dolcito Junction are in the Birmingham district. The reasonableness of the rates from Wise County, Chattanooga, or any other southern origin, except the four Alabama cities named above was not there in issue and no finding was made relative thereto. The column 3 rates are approximately 10 per cent higher than the column 2 rates.

The southern carriers complied literally with the findings of division 4. They reduced all rates from Birmingham that exceeded the column 3 rates, and, in order to eliminate fourth-section departures, the rates from Chattanooga that exceeded the rates made applicable from Birmingham were made the same as the latter. They made no other changes in the rates from Birmingham, Chattanooga, or Wise County. No increases were made in any rates from south-

ern origins. Pressure was brought to bear on the carriers in central territory by producers therein to increase the rates from southern origins to central territory to the column 3 basis. In order to compel increases, the central carriers restricted their concurrences to rates that were no lower than those which would result from a strict application of the column 3 rates.

The column 2 rates are now applicable between points in central territory, with a few exceptions mentioned in the original report. The rates from Chattanooga, Birmingham, and Wise County, Va., to southern destinations are in certain instances slightly higher, and in others lower, than they would be if made strictly on the column 2 basis, but they average about the same. From Chattanooga and Birmingham combined to all destinations having a population of 5,000 or more, both the present and the column 2 rates average $2.96 per ton. The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect.

We concluded in the prior report that the contention of the coke producers and carriers in central territory that the establishment of rates from the South on the column 2 basis would be unduly preferential, was without merit. We affirm that conclusion. We said also:

> The evidence as to transportation conditions actually encountered in southern territory by the traffic here under consideration is not sufficiently comprehensive and definite to warrant us in finding that the rates made on the column 2 basis are full maximum reasonable rates, but we are convinced that joint rates made by applying the column 2 scale from origins to destinations, and adding thereto reason- [fol. 41] able arbitraries as set forth in the appendix for hauls in southern territory, are and for the future will be maximum reasonable rates.

The deficiency in the evidence referred to was principally as to the traffic density over routes from Birmingham. It is shown, however, that coke is shipped only from the Birmingham district, Chattanooga, and stations on the Louis-

ville & Nashville and Interstate in Wise County, Va., to central territory over the main lines of carriers reaching the Ohio River, and that all traffic from the South to central territory and the Northwest moves over those lines. The revenue net tons per mile of road transported by the Cincinnati, New Orleans & Texas Pacific Railway Company, which terminates at Chattanooga and Cincinnati, exceeded that handled by such carriers as the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, New York Central Railroad Company, and the Wabash Railroad Company, and the average handled by all lines operating in central territory, even when those which extend into western trunk-line, southwestern, and southern territories are excepted.

Too much weight was given in the prior report to the absence of the specific data referred to, and not enough to the established rate adjustments in southern and central territories, and the effect rates have on the interterritorial movement of the traffic. Coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory. We have frequently recognized that the transportation burden is differently distributed in official and southern territories and that, on some commodities, rates may justly be relatively lower in the South than in official territory. We have also, in several cases where competitive conditions are somewhat analogous to those here indicated, prescribed rates from origins in western trunk-line and southern territories to official territory on the basis of the scales that apply in official territory. American Distilling Co. v. Akron, C. & Y. Ry. Co., 140 I. C. C. 633; Newsprint Paper Investigation, 197 I. C. C. 738.

The producers of coke in official territory have no just ground for complaint against interterritorial rates from the South to central territory on the same level, mile for mile, as those they pay. If interterritorial rates higher than column 2 rates were warranted, as the central carriers contend, because of more difficult operating conditions in the South it would be proper that the increment accrue solely to the southern carriers. The carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by the prescription of the column 2 rates.

[fol. 42] Rates on coke from the South to points in cen-

tral territory, on the basis of the scale hereinafter prescribed, will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers.

In Cotton, Woolen, and Knitting Factory Products, 211 I. C. C. 692, in discussing the relation which the rates from the South to the North should bear to those within the North, we said:

In determining these various controversies our approach has been consistently confined to the particular problem before us. * * * Whether a particular relation is unduly prejudicial to the North or to the South, and what change in the relation is necessary to correct the situation, is a matter of judgment on all the facts, and that judgment will lead to different results as the circumstances shown of record vary, either because of the passage of time or because different commodities are considered.

We affirm the finding that the suspended schedules have not been justified. We further find that rates on coke, in carloads, from the Birmingham district, Chattanooga, Tenn., and origins on the Louisville & Nashville and Interstate in Wise County, Va., to destinations in central and Illinois territories, for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix and based on the distances over the shortest routes over which carload traffic can be moved without transfer of lading. Specific rates should be published to all destinations to which shipments are likely to move. The orders entered in Coke Between Points in Central and Illinois Territories, supra, and the orders entered in the original report herein, to the extent that they require the establishment and maintenance of rates on coke, in carloads, from and to the points under consideration, which are higher than those prescribed herein for application from and to the same points, should be, and they are hereby, vacated and set aside.

An order giving effect to the foregoing findings will be entered.

MEYER, Commissioner, dissenting:

The basis of rates now established herein as reasonable is the third successively lower basis of rates prescribed in this proceeding within the past three years. As I under-

stand the case, the sole purpose of now requiring a further reduction is to enable southern producers and carriers to better compete with the producers and carriers in the North in the sale and movement of coke to destinations in the North. While the rates now prescribed are termed maximum reasonable rates, as were those twice previously prescribed, they are in fact compelled subnormal competitive rates.

Instead of testing the rates by the standards ordinarily employed, they are here tested solely by the level of the rates applicable within the North and the expressed de- [fol. 43] sires of the southern producers and carriers for the same level of rates from the South to the North for competitive reasons. The logic of the report is that if the northern carriers should later voluntarily reduce the level of their rates within the North, such reduced level would then be prescribed as the maximum reasonable basis from the South to the North if the southern producers and carriers so desired.

The right of carriers to voluntarily reduce their rates to meet competition is recognized. The southern lines are free to exercise this right by reducing their rates to the border of the two territories. I do not recognize a right in this Commission to require the northern lines to join in less than maximum reasonable rates for the sole purpose of enabling southern lines to better meet northern competition.

I am authorized to state that Chairman Mahaffie and Commissioners Porter and Miller join in this dissent.

Appendix

Distance	Rate Cents	Distance	Rate Cents
160 miles and over 140	215	560 miles and over 530	395
180 miles and over 160	225	590 miles and over 560	405
200 miles and over 180	235	620 miles and over 590	415
220 miles and over 200	245	650 miles and over 620	425
240 miles and over 220	255	680 miles and over 650	435
260 miles and over 240	265	710 miles and over 680	445
280 miles and over 260	275	740 miles and over 710	455
300 miles and over 280	285	770 miles and over 740	465
320 miles and over 300	295	800 miles and over 770	475
340 miles and over 320	305	830 miles and over 800	485
360 miles and over 340	315	860 miles and over 830	495
380 miles and over 360	325	890 miles and over 860	505
400 miles and over 380	335	920 miles and over 890	515
425 miles and over 400	345	950 miles and over 920	525
450 miles and over 425	355	980 miles and over 950	535
475 miles and over 450	365	1,010 miles and over 980	545
500 miles and over 475	375	1,050 miles and over 1,010	555
530 miles and over 500	385		

[fol. 44] Order

At the General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 30th day of April, A. D. 1936.

Investigation and Suspension Docket No. 3985

Coke From Alabama and Tennessee to Central Territory

It appearing, that the Commission on March 11, 1935, made and filed its report in the above-entitled proceeding and on March 11, 1935, February 3, 1936, and February 21, 1936, entered its orders in said proceeding;

It further appearing, that on April 15, 1936, the Commission reopened the proceeding for further consideration on the present record, that the proceeding has been reconsidered, and that the Commission, on the date hereof, has made and filed its report on reconsideration containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, that respondents herein, according as they participate in the transportation be, and they are hereby, notified and required to cease and desist on or before August 13, 1936, and thereafter to abstain from publishing, demanding or collecting for the transportation of coke from and to points designated in the next succeeding paragraph hereof, rates which exceed those therein prescribed.

It is further ordered, that the respondents herein, according as they participate in the transportation be, and they are hereby, notified and required to establish on or before August 13, 1936, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of coke, in carloads, from the Birmingham, Ala., district, from origins on the lines of the Louisville and Nashville Railroad and the Interstate Railroad in Wise County, Va., and from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan, rates which shall not exceed those set forth in the appendix to said report based upon distances over the shortest routes over which carload traffic can be moved without transfer of lading.

[fol. 45] It is further ordered, that the orders heretofore entered in Investigation and Suspension Docket No. 3511, Coke Between Points in Central and Illinois Territories, reported in 194 I. C. C. 641; No. 22052, Alabama By-Products Corp. et al. v. Louisville and Nashville Railroad Company et al., consolidated with and disposed of in the report immediately before referred to; and the aforesaid order of February 3, 1936, as modified by the order of February 21, 1936, to the extent that they require establishment and maintenance of rates on coke, in carloads, from origins in Alabama, Tennessee, and Virginia to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan, which are higher than those prescribed in the report made a part hereof, for application from and to the same points, be, and they are hereby, vacated and set aside.

And it is further ordered, that this order shall continue in force until the further order of the Commission.

By the Commission.

George B. McGinty, Secretary. (Seal)

[fol. 46] EXHIBIT "C" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 30th day of April, A. D. 1936.

Investigation and Suspension Docket No. 4198

Coke From Southern Points to Central Territory

It appearing, That there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 2nd day of May, 1936, and later, designated as follows:

Louisville and Nashville Railroad Company:
Supplements Nos. 22 and 23 to I. C. C. No. A-15798;
Roy Pope, Agent:
Supplements 34 and 35 to I. C. C. No. 1770;
Supplements 36, 37 and 39 to I. C. C. No. 1797;

It is ordered, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz:

Roy Pope, Agent:

Supplement 39 to I. C. C. No. 1797, on page 5 thereof, all provisions shown in connection with Index 88700, Madison, Ill.; on page 6 thereof, all provisions shown in connection with Index numbers 119155 to 119325, Riverside, Mich., to Zeeland, Mich.;

And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs named in this order.

It further appearing, That said schedules make certain increases and reductions in rates for the interstate transportation of coke and related articles, in carloads, and the rights and interests of the public appearing to be injur- [fol. 47] iously affected thereby, and it being the opinion of the Commission that the effective date of the said schedules contained in said tariffs should be postponed pending said hearing and decision thereon;

It is further ordered, That the operation of the said schedules contained in said tariffs be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate traffic until the 2nd day of December, 1936, unless otherwise ordered by the Commission, and no change shall be made in such rates, charges, regulations and practices during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered, That the rates and charges and the regulations and practices thereby sought to be altered shall not be changed by any subsequent tariff or schedule, until this investigation and suspension proceeding has been disposed of or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

And it is further ordered, That a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to said schedules and upon

Roy Pope, Agent, and that said carriers parties to said schedules be, and they are hereby, made respondents to this proceeding, and that they be duly notified of the time and place of the hearing above ordered.

By the Commission.

George B. McGinty, Secretary. (Seal)

[fol. 48] EXHIBIT "D" TO COMPLAINT

18814.

Interstate Commerce Commission

[fol. 49] Investigation and Suspension Docket No. 3511 [1]

Coke Between Points in Central and Illinois Territories

Submitted November 11, 1932. Decided June 30, 1933

1. Proposed interstate rates on coke, coke breeze, coke dust, and coke screenings, in carloads, between points in central territory and Illinois territory under suspension in I. and S. No. 3511 found not justified. Suspended schedules ordered canceled and proceeding discontinued.
2. Indiana Coke & Gas Co. v. Ahnapee & W. Ry. Co., 155 I. C. C. 70, reopened and consolidated with these proceedings. Findings and order modified.
3. Present interstate rates on coke, coke breeze, coke dust, and coke screenings, in carloads, between points in central territory and Illinois territory, and from Ashland, Ky., Ironton and Portsmouth (New Boston), Ohio, to destinations in Illinois, Wisconsin, Iowa, Missouri, Nebraska, South Dakota, and Minnesota, assailed in nos. 23173, 23173 (sub-no. 1), 23375, 23375 (sub-no. 1), and 23888 found unreasonable for the future. Rates prescribed.
4. Present interstate rates on coke, coke breeze, coke dust, and coke screenings, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and southern peninsula of Michigan, assailed in no. 22052, found unreasonable for the future. Rates prescribed.
5. Rate on coke, coke breeze, coke dust, and coke screenings, in carloads, from Birmingham, Ala., to Omaha,

Nebr., assailed in no. 23160 (sub-no. 1), found not unreasonable. Complaint dismissed.

6. Petition of Cincinnati, Georgetown Railroad Company for exclusion of the application of joint rates on coke, coke breeze, coke dust, and coke screenings, to or from points on its line to or from points in central territory granted.
7. Temporary fourth-section relief granted.

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[1] This report embraces also No. 23375, Citizens Gas Company of Indianapolis et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 23375 (Sub-No. 1), Diamond Alkali Company v. Akron and Barberton Belt Railroad Company et al.; No. 23173, Ashland By-product Coke Company et al. v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 23173 (Sub-No. 1), Portsmouth By-Product Coke Company et al. v. Atchison, Topeka & Santa Fe Railway Company et al.; No. 22052, Alabama By-Products Corporation et al. v. Louisville & Nashville Railroad Company et al.; No. 23160 (Sub-No. 1), Metropolitan Utilities District of City of Omaha, Nebr. v. Illinois Central Railroad Company et al.; No. 23888, Ashland By-Product Coke Company et al. v. Akron, Canton & Youngstown Railway Company et al.; No. 16243, Indiana Coke & Gas Company v. Ahnapee & Western Railway Company; No. 16611, Citizens Gas Company of Indianapolis v. Alabama Central Railway et al.; No. 19363, Milwaukee Coke & Gas Company v. Ahnapee & Western Railway Company et al.; No. 19403, By-Products Coke Corporation v. Ahnapee & Western Railway Company et al.; No. 19378, Zenith Furnace Company v. Algoma Central & Hudson Bay Railway Company et al.; and No. 19387, Chicago By-Products Coke Company v. Ahnapee & Western Railway Company et al.

[fol. 50] John B. Keeler, Albert A. Mattson, Adolph J. Radosta, Harry I. Allen, Samuel D. Royse, H. A. Hollopeter, A. B. Cronk, F. A. Doebber, D. L. Bennett, William W. Collin, Jr., C. H. Seaman, Norman D. Chapin, Francis W. Brown, C. E. Childe, A. J. Ribe, J. V. Norman, R. B. Coapstick, E. J. McVann, W. E. Rosenbaum, C. E. Widell, Edward D. Sheffe, H. L. Bode, D. L. Kelley, Charles S. Belsterling, Leo E. Golden, A. W. Dahlstrom, Charles H. Winslow, Charles T. Sherman, S. H. Montgomery, J. L. Ludlow, Leonard V. Simms, L. G. Macomber, R. A. Eld-

ridge, William B. Faulkner, C. F. Krone, Joseph W. Connelly, H. Ignatius, R. A. Ellison, Ralph Merriam, and W. Y. Wildman for protestants, complainants, and interveners.

Leo P. Day, H. S. Harr, H. G. Fitzpatrick, James Stillwell, J. N. Davis, J. M. Elliott, A. B. Enoch, P. F. Gault, G. A. Gladson, C. C. Hine, M. M. Joyce, A. H. Lossow, R. S. Outlaw, K. L. Richmond, E. A. Smith, L. H. Strasser, Eldon B. Martin, Walter McFarland, G. M. Swanstrom, Russell B. James, W. A. Northcutt, William C. Burger, H. L. Walker, C. B. Drayton, M. G. Roberts, F. W. Gwathmey, H. R. Wilkinson, and A. L. Holton for respondents and defendants.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Mahaffie

Mahaffie, Commissioner:

Exceptions were filed by opposing parties to the report proposed by the examiner; replies to the respective exceptions were also filed, and oral argument was had. Our conclusions differ from those proposed by the examiner.

The cases consolidated for hearing under the above-entitled number, and heard jointly with representatives of the State commissions of Michigan, Indiana, Ohio, and New York, before whom similar cases are pending involving intrastate rates on coke, in carloads, within their respective jurisdictions, may be briefly summarized as follows:

1. In I. and S. Docket No. 3511, schedules naming certain increased rates on coke, coke breeze, coke dust, and coke screenings, hereinafter called coke, in carloads, constructed on the basis of a proposed scale, for application between points in central and Illinois territories, were suspended upon protest of interested shippers. The effective date of the schedules was voluntarily postponed to September 15, 1933, so that the complaint cases in this proceeding could be disposed of concurrently.

2. Complainants in nos. 23375, 23375 (sub-no. 1), and 23888 assail the present rates on coke, in carloads, from [fol. 51] their various plants in central territory to destinations within that territory, as unreasonable and unduly prejudicial. Complainants in nos. 23375 and 23375 (sub-no. 1) also assail the rates accorded southern producers of

coke from the Birmingham, Ala., Chattanooga, Tenn., Harlan County, Ky., and Wise County, Va., districts to destinations in central territory as unduly preferential of producers in such districts to the undue prejudice of these complainants. They also allege that certain allowances made to producers in the Birmingham and Chattanooga districts on their inbound rates on coal unduly prefer those producers. The complaint in no. 23375 further alleges that the intrastate rates on coke, in carloads, from Detroit and Wyandotte, Mich., to destinations in the Lower Peninsula of Michigan unduly prefer producers at these origins to the undue prejudice of complainants in violation of section 13 of the Interstate Commerce Act. These complainants ask for a reasonable and nonprejudicial scale of rates for application throughout central territory.

3. The complainants in Dockets Nos. 23173 and 23173 (sub-no. 1) assail the rates on coke, in carloads, from Ashland, Ky., Ironton and Portsmouth (New Boston), Ohio, to destinations in Illinois, Wisconsin, Iowa, Missouri, Nebraska, South Dakota, and Minnesota as unreasonable and unduly prejudicial as compared with the contemporaneous rates accorded competing producers located at Terre Haute and Indianapolis, Ind., Chicago and Granite City, Ill., Milwaukee, Wis., and St. Louis, Mo., to the same destinations. Reasonable bases of rates are sought.

4. Complainants in no. 22052 located in northern Alabama, mostly in the Birmingham district, assail the rates on coke, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan as unreasonable and unduly prejudicial as compared with the rates accorded their competitors located at Chattanooga, Tenn., Weirton, W. Va., and various origins in central territory. Reasonable and nonprejudicial joint rates to destinations in the States named are sought.

5. The complaint in no. 23160 (sub-no. 1) alleges that the rate of $6.01 per ton from Birmingham to Omaha, Nebr., is unreasonable. Reparation and a reasonable rate for the future are sought. No. 16243, Indiana Coke & Gas Co. v. Ahnapee & W. Ry. Co., reported at 155 I. C. C. 70, and hereinafter called the Indiana Coke case, was reopened for reconsideration on motion of defendant carriers, and consolidated with these proceedings.

At the hearing it was agreed that a complainant in one case would be considered as having intervened in the other complaint case without the necessity of filing a formal petition of intervention, and that the evidence received in [fol. 52] respect to one complaint would be considered as received with respect to all complaints; further, that the evidence submitted for or against the proposed schedules under suspension in I. and S. No. 3511 would be considered as submitted for or against the existing rates assailed in the complaint cases.

Coke Industry in Central Territory

Coke production.—Coke is used primarily for firing blast furnaces and foundries, and secondarily as a domestic heating fuel. By percentage the consumption is: Furnace coke 75 per cent, foundry coke 6 per cent, domestic use 14 per cent, other uses 5 per cent. Coke is derived mainly from the carbonization of bituminous coal at high temperatures in beehive or by-product coke ovens. It is also derived from distillation of crude oil, the refining of coal tar or pitch, and the production of coal gas. Neither petroleum nor pitch coke is involved in these proceedings.

About 75 per cent of the coke production of the United States, in 1929, was in central territory. Out of a total by-product coke-oven production in 1928 of 48,313,025 tons of coke, 33,938,915 tons, or 69 per cent, were consumed by the producers of the coke in their blast furnaces and affiliated works; 3,136,547 tons, or 6 per cent, were sold to affiliated companies; leaving only 25 per cent for disposal in merchant sales or for domestic consumption. Approximately 43 per cent of the total production for 1928 moved in rail transportation. Originally, coke was produced, with no by-products, entirely in beehive ovens in the Connellsville, Pa., region. Now, beehive ovens furnish not more than 10 per cent of the total coke production of the United States.

By-products of coke ovens.—Other by-products of coke ovens are gas, tar, ammonia, and light oil, 1 ton of coal yielding on the average in 1929, 1,392 pounds of coke, 11,000 cubic feet of gas, 8.9 gallons of tar, 22.3 pounds of ammonium sulphate, and 2.9 gallons of crude light oil. From these commodities there is a further production of ammonia sulphate, benzol, toluol, xylol, and naphthalene.

These by-products, excluding gas, have only a limited market now, which is further restricted by foreign competition. Another form of coke known as gas-house coke, which is not manufactured in by-product ovens, is produced today in limited quantities.

Cost price of coke.—The cost of production of coke is difficult to determine, because of the variation in the accounting methods used by the large producers of coke that are consumers of their own product. In the following [fol. 53] table there is shown the 1928 average cost by States to producers interested in the present proceedings:

State	Coal used (net tons)	Cost of coal		Coal per ton of coke	
		Total	Per ton	Net tons	Cost
By-product plants:					
Alabama	6,215,804	$16,316,220	$2.62	1.44	$3.77
Illinois	4,712,289	20,278,587	4.30	1.45	6.24
Indiana	8,202,943	38,983,679	4.75	1.35	6.41
Michigan	3,397,164	14,829,539	4.37	1.42	6.21
New York	5,501,162	23,803,437	4.33	1.45	6.2–
Ohio	11,466,044	39,376,695	3.43	1.47	5.—
Pennsylvania	20,325,663	56,354,542	2.77	1.51	4.1–
Tennessee	151,424	471,686	3.12	1.34	4.18
West Virginia	1,966,364	5,059,164	2.57	1.44	3.70
Beehive plants:					
Pennsylvania	5,266,357	9,701,498	1.84	1.53	2.82
Tennessee	173,706	371,747	2.14	1.67	3.57
Virginia	420,765	681,827	1.62	1.70	2.75
West Virginia	733,504	1,098,076	1.50	1.70	2.55
Georgia, Kentucky, and Ohio	125,099	815,162	2.52	1.63	4.11

In many instances the cost of coal per ton of coke produced exceeds the value of the coke at the ovens. This does not imply loss to the producers, as the by-products have considerable value. Thus, in 1928, the average value at the oven of by-product coke was $4.90 per ton and the value of the coal entering into the coke was $5.18 per ton of coke, but the by-products were worth $3.66 per ton of coke, netting $3.38 per ton.

Selling price of coke.—Coke is a highly competitive commodity, sold on a narrow margin of profit. Therefore, a producer with a large surplus, which is true of many producers today, quite frequently shades his quoted f.o.b. price to close a sale, which is necessary in many instances to offset a more favorable freight rate enjoyed by his competitor. The average prices f.o.b. ovens, obtained in 1928, which was

a good business year, by producers for the various grades of coke were as follows:

	By-product (per ton)	Beehive (per ton)
Furnace coke (merchant sales)	$5.38	$3.28
Foundry coke	6.98	4.38
Domestic coke	6.23	3.7–
Other industrial coke	6.58	3.8–
Screenings and breeze	2.73	1.7–

The average value of all grades at the ovens was $4.90 per ton for by-product coke, and $3.63 per ton for beehive coke.

Coke as domestic fuel.—Coke used for domestic heating purposes is highly competitive with bituminous coal. Anthracite coal, by reason of its high value, is not to any ex- [fol. 54] tent competitive with coke in central territory. Coke commands a higher price than bituminous coal, based on the advantage of its slow-burning qualities, even temperature, and freedom from clinkers and ash. However, the producers of both bituminous coal and coke are coming into greater competition than ever before with fuel oil and natural gas. As compared with the tonnage of coal moved, coke constitutes only a small percentage. The percentage of bituminous coal sold throughout the Central and Middle Western States covered by these proceedings approximates about 94 per cent of the total of solid fuels. However, due to competition from natural gas and oil, the domestic use of coke and coal is not so extensive west of the Mississippi River.

The average prices obtained on the various domestic fuels sold in the United States in 1928 at points of origin were: By-product coke, $6.23 per net ton (average cost of coking coal delivered at the by-products plants at which the coke was produced was $3.57 per net ton); beehive coke $3.78 per net ton; domestic anthracite, f. o. b. mines Pennsylvania, $8.09 per gross ton; hard coal, produced outside of Pennsylvania, $4.19 per net ton; low-volatile bituminous coal, f. o. b. mines, $1.75 per net ton; burning oil, domestic, f. o. b. refineries, Oklahoma, 3.2 cents per gallon; natural gas for domestic use at point of destination, 62 cents per 1,000 cubic feet. The retail prices of solid domestic fuels per ton at representative destinations in Indiana, Michigan, and Ohio ranged from $14.50 to $16 for anthracite coal, from $8.50 to

$12 for prepared Pocahontas coal and from $8.50 to $11.50 for domestic coke. The growing importance of the domestic market to the merchant producer of coke may be realized from the fact that during 1929 by-product coke producers in central territory sold in commercial markets 6,217,762 tons of coke, of which 3,596,398 tons, or 57 per cent, were used by domestic consumers, the remainder going into industrial use.

Transportation characteristics of coke.—The average car loading of coke in central territory approximates 34 tons. Coke is usually loaded into hopper or side-dump coal cars, but in some instances old box cars are used. Frequently the cars used are those in which inbound shipments of coal, limestone, or ore were received at the plant. Coke is not subject to deterioration in transportation and damage claims are rare. The movement is steady and of considerable volume.

Coke tonnage moving within central territory.—The carriers operating in central territory testified that for the first six months of 1930 the movement of by-product coke between points in that territory amounted to 2,169,629 net tons, and that the tonnage from central to Illinois territory was 62,964 net tons, while from Illinois territory to cen- [fol. 55] tral territory the movement amounted to only 8,045 net tons. Freight commodity statistics filed with us, which cover the total freight traffic in coke originating on class I roads in the Great Lakes and central-eastern regions, including also movements originating in trunk-line territory, show that for the year 1929 the carriers therein originated 14,581,846 tons, while the total revenue received by them for that year on this commodity was $26,728,881. For 1930, these statistics showed a decrease to 10,673,262 tons, while the revenue received amounted to $18,235,430.

Average hauls of coke within central territory.—As previously stated, the major portion of the coke produced is consumed close to the ovens of production. On this coke the carriers obtain very short, if any, line-haul movements. Moreover, on the tonnage which does move between plants or to consumers, the evidence indicates that the hauls generally are not for any considerable distance. Probably 60 per cent of the line hauls between points in central terri-

tory are under 150 miles in length, while at least 75 per cent of the tonnage moves distances under 300 miles. Producers in central territory whose shipments average in excess of 150 miles in length may be classified as long-haul shippers, while those shipping distances under 150 miles may be termed short-haul shippers.

The rates will be discussed in the following order: (1) The proposed rates under suspension in I. and S. No. 3511, (2) present rates within central and Illinois territories, (3) present rates from central to western trunk-line territory, (4) rates from southern territory to central territory, and (5) the rate from Birmingham to Omaha. Rates, which do not include the present authorized emergency charges, will be stated in amounts per net ton of 2,000 pounds.

Investigation and Suspension Docket No. 3511

A brief discussion of the antecedents of the present coke rate structure in central territory will serve to illustrate the background of these proceedings and clarify the contentions of the various parties. Important among cases concerning rates on beehive coke from the Connellsville district to points in central territory are Coke Producers Asso. of Connellsville v. B. & O. R. R. Co., 27 I. C. C. 125, and Wisconsin Steel Co. v. P. & L. E. R. R. Co., 27 I. C. C. 152. The former dealt with rates from Connellsville to Youngstown, Canton, Cleveland, and Toledo, Ohio; the latter concerned the rate from Connellsville to Chicago. The carriers early accorded gas-house coke, then a waste product, low rates to aid in its disposal as a fuel. Respondents maintain that the effect of these rates has tended to keep down the general [fol. 56] level, but this assertion is not substantiated by the evidence of record.

In 1916 the carriers in central territory constructed what is known as the "12664" or "1916 checking scale", which was never put into effect, but was used, not consistently, as a guide for the publication of point-to-point rates. Then came the decision by us in the Indiana Coke case. The defendants therein were directed to accord to producers of coke located at Terre Haute and Indianapolis, Ind., Chicago, Ill., and Milwaukee, Wis., two scales of rates, one to apply in constructing rates to destinations in Illinois and the southern portion of Wisconsin, or Illinois territory, hereinafter referred to as the i. f. a. scale (appendix 2);

the other, known as the western trunk-line or w. t. l. scale (appendix 2), with arbitraries added in certain instances, was for application from the same origins to certain destinations in Iowa, Missouri, Nebraska, South Dakota, Minnesota, and Wisconsin. Destinations within certain excepted territory in Iowa, Missouri, and Wisconsin were accorded rates based on the i. f. a. scale.

The basic scale prescribed in the Indiana Coke case is the w. t. l. scale, which is built around a rate of $3.25 prescribed in Warren Coke Co. v. A., T. & S. F. Ry. Co., 112 I. C. C. 71, for application from St. Louis, Mo., to Missouri River cities for an average distance of 340 miles. In order to make the progression uniform the scale rate for that distance was made $3.30. The i. f. a. scale is approximately 10 per cent under the w. t. l. scale. Distances were to be computed over the shortest possible routes, embracing the lines or parts of lines of not more than three carriers not under common control or ownership. The i. f. a. scale was adopted by the State commissions of Illinois and Wisconsin for application, with certain exceptions, on intrastate coke shipments within those States. In Greater Muskegon Chamber of Commerce v. Pere M. Ry. Co., 159 I. C. C. 414, we prescribed rates on coke from Painesville, Ohio, to Muskegon and Montague, Mich., equivalent to rates based on the i. f. a. scale. The publication of rates constructed on the i. f. a. and w. t. l. scales naturally has given rise to considerable dissatisfaction on the part of producers located east of the Illinois-Indiana boundary, as well as from the Indiana and Illinois producers at the origins named with respect to their shipments to points east of the Indiana-Illinois State line. Numerous conferences between shippers and carriers have failed to produce a satisfactory rate adjustment. A representative showing of the assailed rates, and what they would be under the various scales sought, is shown in appendix 1. The long-haul shippers, some of which also ship comparative short distances, generally favor the [fol. 57] establishment of rates in central territory based upon the i. f. a. scale. Certain of the short-haul shippers advocate the adoption of the so-called Petersen scale (appendix 2).

Respondents designed their proposed scale (appendix 2) to protect their revenues against constant rate reductions, to stabilize and unify the coke rate structure in central territory, and to preserve the present beehive-coke rate

adjustment from the Connellsville district. Under the proposed adjustment the present rates from principal producing points to 183 representative destinations selected by respondents would be increased in 104 instances, decreased in 43 instances, and remain the same in 36 cases. The simple averages of the present and proposed rates shown are $2.20 and $2.28, respectively.

Level of scale.—Respondents seek to justify the level of the proposed rates by comparing them to (1) the so-called Seaboard scale (appendix 2) prescribed in Seaboard By-Products Coke Co. v. Director General, 62 I. C. C. 317; (2) rates prescribed by us from the Connellsville district; (3) rates on coal and other commodities regarded as comparable to coke; and (4) by emphasizing the lack of what they consider a fair return upon their property investment.

The proposed rate of $1.01 for the first 10 miles reflects the Seaboard scale rate for that distance on August 25, 1920, initially reduced 10 cents, and subsequently increased 40 per cent, then reduced 10 per cent in accordance with the authorized general rate changes. The proposed scale is progressed less rapidly than the Seaboard scale as a concession to the great volume of tonnage moving less than 150 miles; also to secure a more consistent progression. Respondents state that their scale averages approximately 10 per cent less than the Seaboard scale. In support of their use of the Seaboard scale as a base, respondents cite Hudson Valley Coke & Prod. Corp. v. N. Y., N. H. & H. R. R. Co., 129 I. C. C. 472, wherein rates were prescribed from Troy, N. Y., to New England, based on the Seaboard scale, and Standard Gas Equipment Corp. v. Lehigh Valley R. Co., 160 I. C. C. 4, wherein a rate of $5.04 charged on two cars of coke from Greenville, N. J., to Baltimore, Md., was found unreasonable to the extent it exceeded $3.28, the contemporaneous Seaboard scale rate for 252 miles. The shippers' criticism of the use of the Seaboard scale rests upon the grounds that it was prescribed for the higher rated New England territory, that it reflects a high basis of rates originally established from Providence, R. I., to New England during the World War as an emergency measure, and that the present movement thereunder is inconsequential.

The proposed scale corresponds closely with the present level of rates from the Connellsville region, illustrated be-

[fol. 58] low, many of which rates were approved or prescribed by us for application on beehive coke:

To—	Average distance	Present rate	Proposed rate
	Miles	Cents	Cents
Canton, Ohio	171	252	252
Cleveland, Ohio	201	277	277
Toledo, Ohio	305	328	328
Muncie, Ind	390	391	365
Chicago, Ill	524	416	416

The rate of $4.16, Connellsville to Chicago, is one of the key rates upon which the proposed scale is based. The shippers assail the propriety of this relationship, pointing out that the coke rates in central territory are not related to rates from Connellsville, that the latter rates reflect large origin groups; also extra cost of assembling, special equipment, empty-return movement, and difficult operating conditions, which are negligible rate-making factors insofar as coke rates within central territory are concerned. It is urged also, in view of the introduction of the by-product method of production, with the attendant enormous flow of coal to the coke ovens which eliminates much of the long haul on coke, the shift of coke production to central territory and the wide distribution therefrom, and the decline of the movement from Connellsville, that the Connellsville rates are antiquated and constitute no proper guide in the making of rates for a comparatively new industry operating under radically different economic conditions.

Numerous comparisons were made by respondents between the revenue under the proposed rates and that under rates on bituminous coal, the following being representative:

(1)	(2)	(3)	(4)	(5)	(6) Earnings per car-mile [1]	
From—	To—	Average short route	Rate on coal	Proposed rate on coke	Under column 4	Under column 5
		Miles		Cents	Cents	Cents
Ohio district	Toledo, Ohio	197	$1.89	265	53.30	45.60
Do	Peru, Ind	304	2.25	328	39.52	36.56
Inner Crescent	do	410	2.75	378	35.82	31.25
Outer Crescent	Lansing, Mich	506	3.15	416	33.24	27.87
Do	Chicago, Ill	593	3.29	428	29.63	24.47

[1] Average loading used is 33.9 tons for coke and 53.4 for coal.

Similar comparisons demonstrate that the proposed coke rates yield less revenue per car-mile than rates on anthracite coal, stone, cullet, pig iron, wood pulp, bulk salt, and other commodities. The greater weight of these compared commodities accounts for the higher car-mile earn- [fol. 59] ings. However, on the basis of ton-mile earnings the proposed coke rates reflect a higher level. Furthermore, the coal rates are group rates as compared to distance rates on coke. On the other hand, by selecting lighter-loading commodities for comparison, the car-mile earnings under the proposed rates can be made to appear relatively high, as shown below:

	Proposed scale		C.f.a. fertilizer scale, 146 I.C.C. 419		C.f.a. lime scale, 112 I.C.C. 7	
Distance	Rate	Car-mile revenue [1]	Rate	Car-mile revenue [1]	Rate	Car-mile revenue [1]
		Cents		Cents		Cents
30 miles	$1.13	133.5	$1.30	111.4	$1.90	139.9
200 miles	2.65	46.9	2.90	37.2	2.80	30.9
400 miles	3.65	32.3	4.10	26.3	3.60	19.8

[1] Average loading: Coke 70,900 pounds, fertilizer 51,420 pounds, lime 44,180 pounds.

Respondents state that their proposed scale averages 63.96 per cent of the new eastern sixth-class rates, and instance a number of cases in which sixth class or percentages thereof have been approved on various commodities such as building stone, roofing and paving pitch and tar, and pitch coke.

As evidence of their need for increased revenues the carriers in central territory submitted an exhibit showing property investment and operating income of class I railroads in the eastern district, excluding the Pocahontas region, for the years 1921 to 1930, inclusive. The rate of return on the property investment of the carriers in the eastern district was 5.17 per cent for the year 1926, and the rate of return declined from 5.08 per cent for 1929 to 3.35 per cent, and if the carriers in the Pocahontas region are included, to 3.73 per cent, for the year 1930. The need of the carriers for increased revenues is well known. It was made the subject of an investigation by us in the Fifteen Per Cent Case, 1931, 178 I. C. C. 539. The carriers were allowed by the supplemental report therein, 179 I. C. C. 215, to increase their rates on coke 6 cents per ton, subject to the limitation that the increase should not exceed 10 per cent of the rate.

The proposed scale is opposed by all of the coke producers of record as well as the receivers who testified. They point out that the same scale was rejected by us in the Indiana Coke case. Long-haul shippers contend that the scale progresses too rapidly for the long hauls and too slowly for the short hauls, pointing out that it is 56 per cent of sixth class in the lower blocks, but reaches 70 per cent at 380 miles. The short-haul shippers contend that the reverse of this situation is true and attribute the alleged inflation of the proposed short-haul rates to the fact that respondents' [fol. 60] scale is based largely on the 1916 checking scale. The flat increases authorized in Ex parte 57 and General Order 28, in connection with the percentage increase of Ex parte 74, as applied to rates based on the 1916 checking scale, tended to increase the short-haul rates disproportionately higher than the long-haul rates. The receivers apparently divide along the same lines as the producers, except that those at Muskegon, on exceptions, support a basis representing 16 per cent of first class. The proposed scale, as compared with the 1916 checking scale, is higher from 50 to 330 miles, the same from 330 to 700 miles, and lower from 700 to 740 miles. It is higher than the w. t. l. scale from 50 to 485 miles. For an average haul of 371 miles the proposed scale would yield 9.03 mills per ton-mile, the i. f. a. scale yields 8.23 mills, and the w. t. l. scale produces 9.07 mills. The proposed scale is also higher for distances to 150 miles than the c. f. a. brick and common-brick scales prescribed in National Paving Brick Asso. v. A. & V. Ry. Co., 68 I. C. C. 213.

The producers at Terre Haute state that increases would result in rates therefrom for distances from 50 to 325 miles affecting 85 per cent of the shipments to central territory. From Indianapolis to 40 representative destinations, increases would average 31 cents per ton, while the i.f.a. scale would increase the rates an average of 4 cents per ton. Advances of 12 to 50 cents per ton would result in the rates from Portsmouth. The rates from Ashland, Ironton, and Detroit would be increased generally. From Detroit to 23 important consuming points in Michigan, the increases would average 16.5 per cent. From Hamilton, Ohio, to 35 representative destinations, the average increase would be 18 cents per ton, or 12.4 per cent. The Procter & Gamble Company, at Cincinnati, Ohio, which receives coke from Hamilton, points out that the present rate of $1.01

would be increased to $1.13. Evidence was introduced in support of its request for a rate of 90 cents, the rate under the Petersen scale. From Painesville, Ohio, two thirds of the shipments moved within a radius of 75 miles. On 64 per cent of the tonnage, the rates would be increased in amounts ranging from 12 to 38 cents per ton, on 3 per cent there would be no substantial change, and on the remaining 33 per cent the rate would be increased for hauls beyond 150 miles. From Youngstown, Canton, Massillon, and Warren, Ohio, the preponderance of movement is for distances up to 150 miles, a large volume moving 30 miles and less. To 19 representative destinations in central territory the rates would be increased in 13 instances in amounts ranging from 12 to 38 cents, and decreased in one instance 12 cents.

A noteworthy effect of the carriers' proposed adjustment for central territory would be the creation therein of a higher level of rates than applies under the i.f.a. scale [fol. 61] within Illinois territory and between points accorded that scale. From Indianapolis and Chicago the situation would be as indicated below:

	Distance	Rate	Ton-mile revenue	Car-mile revenue, 30-ton loads
	Miles		Mills	Cents
Chicago, Ill., to Evanston, Ill.	12.0	$1.00	83.3	250.0
Indianapolis, Ind., to Lawrence, Ind.:				
Present	9.2	1.01	109.7	329.-
Proposed	9.2	1.13	122.8	368.-
Chicago, Ill., to Kankakee, Ill.	56.0	1.35	24.1	72.-
Indianapolis, Ind., to Muncie, Ind.:				
Present	54.3	1.39	25.5	76.7
Proposed	54.3	1.51	27.8	83.4
Chicago, Ill., to Rockford, Ill.	85.0	1.65	19.4	58.2
Indianapolis, Ind., to Madison, Ind.:				
Present	85.8	1.76	20.5	61.5
Proposed	85.8	1.89	22.0	66.0
Chicago, Ill., to Peoria, Ill.	155.0	2.10	13.5	40.6
Indianapolis, Ind., to Wolcottville, Ind.:				
Present	155.6	2.15	13.8	41.-
Proposed	155.6	2.39	15.3	46.0

Exception to scale.—Respondents propose to depart, in certain instances, from the scale rates for the first 30 miles and under. The minimum rate is fixed at 63 cents. This plan is favored by shippers having a substantial market within a radius of 30 miles. In justification of the departure, it is urged that in an area of large industrial development where the service is essentially a switching movement, the commercial and competitive conditions render unwise and economically unsound the strict application of a mileage

scale. Respondents also regard this step as necessary to meet truck competition. Certain of the long-haul shippers, notably at Indianapolis and Terre Haute, contend that this exception to the scale would tend to keep them out of the markets favored by such an adjustment, thus giving a monopoly to nearby producers. They scout the idea of successful truck competition and state that such departures eventually would break down the entire coke-rate adjustment. They point out that truck transportation, even if practicable, could be used only in moving domestic coke, while the great tonnage of foundry coke, which is not adaptable to truck movement, would secure, without good reason, the benefit of the depressed rail rates. The findings and order hereinafter made provide for a maximum reasonable scale of rates which may be departed from provided no unlawful situation is thereby created.

Groupings.—Respondents propose the following origin groups. (a) Pittsburgh group. This group includes Clairton, Neville Island, and Pittsburgh, Pa. For distances up to approximately 50 miles from Pittsburgh the rates are made [fol. 62] on a point-to-point mileage basis. Between 50 miles and 200 miles from Pittsburgh the rates from Clairton were computed on Bessemer, Pa., distances, and from Neville Island and Pittsburgh, on the basis of Pittsburgh distances. To destinations in excess of approximately 200 miles from Pittsburgh, the three origins are grouped, Pittsburgh mileages being used. (b) Mahoning and Shenango origin group. The principal origins in the Mahoning and Shenango Valleys group are Letonia, Lowellville, Struthers, Youngstown, Hubbard, and Warren, Ohio, and New Castle, Farrell, Sharon, and Sharpsville, Pa. A point-to-point basis is used for 50 miles and under. Beyond 50 miles, group rates are to apply, using Youngstown distances. (c) Wheeling group. The principal origins in this group are Wheeling, Weirton, and Follansbee, W. Va., and Steubenville, Ohio. For distances of 100 miles and under, point-to-point mileages were used; beyond 100 miles, group rates are to apply, computed on the average of the distances from the stations named. It is pointed out by a producer in this group, on exceptions, that the coke plant at Wheeling has been dismantled. If this be true, Wheeling should be eliminated from the group. (d) Southern Ohio group. This group includes Ashland, Ironton, and Portsmouth (New Boston). To desti-

nations up to 100 miles, the rates are based on point-to-point mileages; beyond 100 miles the average distance is used. (e) Canton-Massillon group. The principal points in this group are Canton and Massillon. The rates for 50 miles and under are on a point-to-point mileage basis; beyond 50 miles the average distance is used. (f) Chicago group. The Chicago group comprises Chicago and Joliet, Ill., and Gary, Ind. For distances of 100 miles or under the rates are computed on point-to-point mileages, except from Gary, Chicago mileages are used; beyond 100 miles the origins are grouped, using Chicago mileages. (g) Detroit-Wyandotte group. The rates from this group are based on the distances from Detroit. (h) St. Louis group. This group includes St. Louis, Mo., and East St. Louis and Granite City, Ill. Rates are based on East St. Louis mileages. (i) Buffalo group. This group includes Buffalo and Harriet, N. Y., from which rates for 50 miles or under are constructed on point-to-point mileages, and for distances in excess of 50 miles, on a group basis, using the averages of the distances from these two origins. (j) In addition, respondents propose a destination group covering Chicago, Chicago Heights, Joliet, and Gary, to which rates would apply based on the distances to Chicago.

Opposition was voiced by some of the protestants to certain of the proposed groups. Certain of the objections raise issues that are primarily intrastate in nature. As to the others, no sufficient reason appears for disturbing the pro-[fol. 63] posed groups, except that, in our opinion, distance from Neville Island to Youngstown should be computed from Pittsburgh and Ohio Valley Junction instead of Neville Station.

Complaint Cases Involving Rates Within Central and Illinois Territory, Nos. 23173, 23173 (Sub-No. 1), 23375, 23375 (Sub-No. 1), and 23888

While all of the shippers oppose the suspended rates, they differ among themselves as to what basis should be established. The long-haul shippers advocate adoption of the i.f.a. scale for central territory, computed on basis of the shortest route via junctions where interchange of traffic is possible without transfer of lading. Certain of the short-haul shippers desire the adoption of the Petersen scale. A discussion of these scales follows:

Level of i.f.a. scale.—Advocates of the i.f.a. scale seek to justify its level in three ways, (1) by a consideration of the relationship between coke and competitive fuels, (2) by a study of the revenue produced thereunder, and (3) by comparisons with rates on other commodities.

Coke meets keen competition, particularly in domestic consumption, from bituminous coal, natural gas, and fuel oil. The producers of coke insist that their product does not enjoy its fair share of the fuel market, and that in determining the rates on coke these competing factors must be considered. In this connection evidence was submitted to show that the average rate increase to representative destinations since 1917 on bituminous coal was 65 per cent, fuel oil 81 per cent (which percentage does not reflect recent rate decreases), anthracite coal 52 per cent, and coke 73 per cent. The effect that adoption of the i.f.a. scale would have on the carriers' revenues is partially illustrated by the following table:

Origin	Tons shipped	Revenue		
		Present rate	Suspended rate	I.f.a. scale
Indianapolis [1]	160,000	$387,454	$458,903	$402,960
Terre Haute	108,312	251,860	288,069	260,363
Detroit	200,565	313,026	370,543	329,836
Ashland and Ironton	435,841	1,187,815	1,303,098	1,153,994
Harriet	5,879	7,588	8,521	7,369
Youngstown [2]	35,058	105,982	112,078	103,008
Total	945,655	2,253,725	2,541,212	2,257,530

[1] Estimated.

[2] Does not include shipments to Mahoning and Shenango Valleys, omits shipments to Canada, and is tonnage for one quarter year only.

[fol. 64] This showing demonstrates that the i.f.a. scale would increase the present revenue slightly. Defendants, however, submitted a study showing the revenue effect on 2,169,629 tons of coke moving in central territory during the first six months in 1930 which would be affected by the proposed adjustment. The present rates yielded $3,589,698. Under the suspended rates the total would have been $3,640,001, an increase of 1.4 per cent, and under the i.f.a. scale applied to all distances the revenue would have been $3,412,265, a decrease of 4.9 per cent, and $3,278,089, or a decrease of 8.7 per cent, if certain lower rates are applied for hauls of 30 miles and under, as contemplated by the revision under suspension. Complainants maintain that the apparent loss thus shown under the i.f.a. scale would be re-

duced to as little as $24,283, if a deduction be made from present revenue in the amount of $153,150, which represents freight charges on one half of the annual tonnage from Clairton at the difference between the proposed rate of $1.76 and the present rate of $1.99, said to be unreasonably high.

That coke would bear its fair share of the transportation burden under the i.f.a. scale as compared with other commodities is sought to be established by complainants in the following illustration:

	Car-mile revenue									
	10 miles Cents	100 miles Cents	200 miles Cents	300 miles Cents	400 miles Cents	500 miles Cents	600 miles Cents	700 miles Cents	Value per ton	Average loading Pounds
Coke	291.6	53.4	38.0	30.2	26.4	23.9	22.1	20.1	$5.73	64,818
Ground coal	300.0	52.5	36.0	26.6	22.5	19.5	17.9	16.4	8.75–9.00	50,000
Salt cake	488.7	90.7	61.1	40.5	37.5	33.5	30.3	27.9	20.00	69,827
Fuller's earth	416.1	71.3	49.0	36.6	30.4	26.7	24.2	22.5	15.00–25.00	59,448
Sixth class	354.6	62.6	42.8	32.0	26.6	23.4	21.2	19.7	.....	41,723
Fertilizer	251.4	55.3	37.0	29.3	25.8	23.6	21.4	19.8	24.45–85.00	50,280
Cement	494.7	72.3	47.6	38.1	31.4	28.2	25.3	23.4	10.64	76,100

The average revenue on all freight for the principal roads in central territory in 1929 ranges from 6.2 to 10.52 mills per ton-mile and from 18.2 to 28.9 cents per car-mile. On 1,300,546 tons of coke moving from the southern Ohio group, Detroit, Indianapolis, and Terre Haute, the i.f.a. scale would have produced an average revenue of 11.8 mills per ton-mile and 36 cents per car-mile.

Progression of i.f.a. scale.—The progression of the i.f.a. scale is contrasted in appendix 3 with that of various scales which we have prescribed. The rate for 700 miles exceeds the rate for 5 miles in the amount of $3.45 under the i.f.a. scale, $3.15 under the 15 per cent of the present first-class rates, and $2.10 under 70 per cent of the cement scale. The short-haul shippers point out that the cement scale used is not a proper criterion because it is subject to the same [fol. 65] criticism that is made of the 1916 checking scale, that is, uniform increases have unduly inflated the short-haul rates. Southern Cement Case, 132 I. C. C. 427, 456.

The short-haul shippers criticize the i.f.a. scale as being too high for the short hauls and too low for the long hauls. They point out that the disadvantage of the long-haul shippers of being remote from the consuming markets is offset by their close proximity to sources of coal. They argue that it is wasteful, both from a transportation and an economic standpoint, to stimulate, by relatively low long-haul rates, the movement of coke from distant points to the already flooded markets naturally tributary to the short-haul producers. They urge also that undue encouragement of long-haul traffic tends to reduce the tonnage of coal traffic because, in view of the proximity of the long-haul producers to the coal mines, the long-haul of a ton of coke displaces the haul of 1.4 tons of coal. They contend that in fixing a mileage scale on coke some consideration should be given to the inbound charges on coal which figure in the production costs to the short-haul shippers to a much more appreciable extent than in the cost to the long-haul shippers. They show that the i.f.a. scale ranges from 153 per cent of 85 per cent of the bituminous-coal scale prescribed in Holmes & Hallowell Co. v. G. N. Ry. Co., 69 I. C. C. 11, at 30 miles to 104 per cent at 650 miles. They point out, too, that for short hauls the i.f.a. scale ranges from 81 to 100 per cent higher than the original 1916 checking scale, while on the longer hauls the

increase is only from 56 to 65 per cent. In refutation of the contention that the i.f.a. scale is unduly low for long hauls, the long-haul shippers point out that as compared with 15 per cent of present first-class rates in official territory, the i.f.a. scale is higher for distances of 150 miles and over, and the same as or lower, for hauls under 150 miles. From comparisons shown in the preceding table, and others instanced by the long-haul shippers, it is determined that the rates on the commodities named at 600 miles range from 215 to 319 per cent of the rates on the same commodities for 50 miles. The i.f.a. scale rate on coke for 600 miles is 315 per cent of the rate for 50 miles, which fact, according to the long-haul shippers, further disproves the contention that the i.f.a. scale unduly favors long-haul traffic.

Defendants criticize the i.f.a. scale on the ground that it reflects a depressed competitive rate structure voluntarily established in Illinois to enable producers therein to compete in the Chicago market with the plants located there and at Milwaukee. In opposition to defendants' contention that the i.f.a. scale is competitively depressed, complainants show that to representative points the i.f.a. scale rates, with [fol. 66] one exception, range from 102.4 to 135 per cent of the rates previously in effect intrastate in Illinois. They show also that on four principal roads in Illinois the average freight revenue ton-mile in 1928 ranged from 8.97 to 12.67 mills, while under the i.f.a. scale the revenue computed in a similar manner would have ranged from 11.08 to 26.04 mills per ton-mile. They also emphasize the fact that the i.f.a. scale was predicated on a rate of $3.25 prescribed in the Warren Coke case from St. Louis to Missouri River cities. In answer to the contention that this rate was competitively affected, complainants point out that it was originally prescribed for 340 miles, and was not only increased to $3.30, but was made applicable for 320 to 340 miles.

The short-haul shippers take the position that the present rates on coke within central territory are unreasonably high for the short hauls and unduly low for the long hauls. As stated, some of them advocate the Petersen scale for application in central territory, which scale is related to and based upon so-called maximum rates existing in central territory on bituminous coal. For western trunk-line territory they propose a 5-cent differential to be added to rates under the Petersen scale.

The Petersen scale.—The Petersen scale approximates 125 per cent of 85 per cent of the Holmes & Hallowell coal scale (appendix 4). It actually ranges from 120.5 to 133.6 per cent thereof. This relationship is supported on the ground that (1) the coke movement outbound is merely the completion of the coal movement inbound, (2) coke competes with coal, and (3) such a relationship will preserve the coal rate structure. The relationship of coke to coal rates has been recognized. Lombard Brick & Tile Co. v. C. & N. W. Ry. Co., 30 I. C. C. 84; Buffalo-Union Furnace Co. v. B. & S. R. R. Corp., 43 I. C. C. 218.

Level of Petersen scale.—Eighty-five per cent of the Holmes & Hallowell scale was adopted as the base for the asserted reason that we have recognized it as a maximum reasonable basis for rates on coal in central territory. Clinton v. Baltimore & O. R. Co., 167 I. C. C. 294; International Paper Co. v. B. R. & P. Ry. Co., 146 I. C. C. 59. Advocates of the Peterson scale submitted a comprehensive study of coal rates in central territory showing that they average something less than 85 per cent of the Holmes & Hallowell scale. The 125 per cent basis allows for the differences in value and loading as between coke and coal and is selected as a matter of judgment based on a review of numerous cases in which we have prescribed rates on competing and related commodities. Among the cases cited may be mentioned O'Meara v. Baltimore & O. R. R. Co., 157 I. C. C. 785 (rough limestone accorded rates 80 per cent of dressed limestone rates); Northwestern Ohio Lime Mfrs. v. Penn-
[fol. 67] sylvania R. Co., 159 I. C. C. 9 (fluxing lime accorded rates 80 per cent of common-lime rates); and Mid-continent Oil Rates, 1925, 112 I. C. C. 421 (fuel oil and low-grade petroleum products accorded rates 80 per cent of rates on refined oil). In none of the cases cited was the spread greater than 25 per cent; also the spread in value and loading between the commodities instanced is considerably greater than between coke and coal. In the territory of the Holmes & Hallowell coal scale the carriers use a basis for rates on coke called the Holmes & Hallowell coke scale (appendix 4), which averages approximately 114.5 per cent of the former scale. Rates approximately equal to this coke scale were prescribed in Minnesota By-Product Coke Co. v. Director General, 66 I. C. C. 480. Attention is also called to the fact that the transportation

of coke does not entail the expensive terminal and assembling services usually required in handling coal traffic. To 373 representative destinations in central and western trunk-line territory, the Petersen scale would produce increases to 149 points averaging 22.13 cents, and reductions to 224 points averaging 21.54 cents.

Progression of Petersen scale.—The Petersen scale represents increases ranging from 64 to 85 per cent over the original 1916 checking scale on hauls from 20 to 200 miles, and from 69 to 79 per cent on hauls from 225 to 550 miles. These changes were made to correct the alleged irregularities in the short-haul rates of the present 1916 checking scale, created by the authorized general increases heretofore mentioned. The Petersen scale is lower up to 460 miles and higher beyond than respondents' proposed scale, lower up through 200 miles than the i.f.a. scale, the same as the i.f.a. scale from 200 to 265 miles, and higher for the longer distances. It is higher for all distances than 85 per cent of the Holmes & Hallowell coal scale.

The long-haul shippers fear that the Petersen scale would build a rate wall around the short-haul markets for the benefit of nearby producers, which could not be overcome even by a reduction in the price of coke. The rate prescribed on brick in Mason City Brick & Tile Co. v. Director General, 107 I. C. C. 702, for 340 miles, is $3.10, which is 15 cents lower than the Petersen scale rate for that distance, yet the rate prescribed therein for 30 miles of $1.20 is 30 cents higher than the Petersen scale rate for that distance. Criticism is also made by the long-haul shippers of the fact that the Petersen scale follows the progression of the Holmes & Hallowell coal scale, a scale designed for traffic conditions radically different from those obtaining in central territory, particularly insofar as it reflects the favorable transportation conditions for the first 150 miles from Duluth, Minn., to the Twin Cities, and thereafter grades upward sharply for the longer distances. They point out also that the spread of the rate for 30 miles under [fol. 68] the Petersen scale over the rate based on 85 per cent of the Holmes & Hallowell scale for the same distance is 18 cents, and that it is 87 cents at 650 miles. It is argued that if 18 cents is a proper difference at 30 miles, it is also proper at 650 miles. The objections raised against this

scale persuade us that it would not provide a satisfactory basis for a coke-rate adjustment in central territory.

Undue prejudice.—It is generally agreed by all parties that there is no uniformity in the coke-rate structure in central territory. Appendix 1 confirms this view. The establishment of rates based on the i.f.a. scale from Indianapolis, Terre Haute, Chicago, Milwaukee, and St. Louis to Illinois territory gave the producers there the benefit of rates relatively lower than from many competing points in central territory, which advantage, incidentally, would be perpetuated to a considerable degree under respondents' proposed scale. The producers in central territory also allege undue preference in the rates accorded southern producers of coke in the Birmingham, Chattanooga, Harlan County, Ky., and Wise County, Va., districts.

The producer at Hamilton alleges undue preference of Birmingham and Chattanooga in the rates to Louisville, Ky., and Cincinnati. The rate to Louisville from Hamilton, 136 miles via the short-line route of the Baltimore & Ohio Railroad to Cincinnati and Louisville & Nashville Railroad beyond, is $2.39. From Chattanooga and Birmingham, 312 and 392 miles respectively, the rates are $2.59 and $2.93 respectively. Thus Hamilton has an advantage in distance over Chattanooga of 130 per cent and over Birmingham of 190 per cent, yet its rate advantage is only 8.3 per cent and 22 per cent, respectively. Under respondents' proposed scale, the rate from Hamilton to Louisville based on the short-line distance would be $2.27, and under the i.f.a. scale it would be $1.95. The Hamilton producer states that it cannot enter the Louisville market with its coke. The rate from Birmingham is published by the Louisville & Nashville Railroad and traffic is handled by that carrier direct. There are also routes from Hamilton to Louisville over the Baltimore & Ohio Railroad and the Pennsylvania Railroad. The Birmingham producers and the Louisville & Nashville Railroad contend that there is no basis for a finding under section 3, since the Louisville & Nashville does not fix the rate from Hamilton, is not a necessary party thereto, and that it alone could not remove the alleged prejudice. In this connection, the Hamilton producer points out that the Louisville & Nashville handles approximately 87 per cent of the coke moving from the Birmingham district to central territory, and that the competition

complained of comes chiefly from a plant at Tarrant, Ala., [fol. 69] located in the Birmingham district on the Louisville & Nashville.

From Hamilton to Cincinnati, 25.6 miles, an intrastate movement, the rate is $1.01 as compared with $3.38 from Birmingham, 481 miles, and $2.59 from Chattanooga, 338 miles. The Hamilton producer claims that it has had to reduce its price on coke at Cincinnati to meet the price quoted by the Birmingham producers. Coke moves from Hamilton to Cincinnati over the Baltimore & Ohio Railroad direct, which carrier does not participate in the movement to Cincinnati from either Birmingham or Chattanooga.

Rates from Chattanooga and Birmingham to destinations in central territory reflect no uniformity. Reference to appendix 5, and to other comparisons of record discloses that in many instances these rates are relatively lower than those from competing origins in the North to central territory. In numerous other instances the reverse of this situation obtains. The northern producers allege that the relatively lower rates from the South are unduly preferential of Birmingham and Chattanooga, while southern producers allege, in no. 22052, that they are unduly prejudiced by the relatively higher rates from the South.

The Indiana producers compiled an elaborate study of our reports relating to rates on a variety of commodities moving interterritorially between points in the South and central territory showing that rates in the South range from 8 to 36 per cent in excess of rates on similar commodities in central territory. They also show that the freight-traffic densities of carriers in the South, as a whole, are less than in central territory. From these studies they conclude that rates generally within the South are on a level 20 per cent higher than in central territory. Accordingly, they suggest that through rates from the South to central territory should be constructed on the basis of proportional rates 20 per cent higher than the i.f.a. scale for the portion of the movement to the Ohio River crossings, plus the i.f.a. scale rates beyond.

The southern producers, in connection with no. 22052, offered testimony to support their contention that the scale determined to be proper for central territory should be extended without the addition of arbitraries to Birmingham and Chattanooga. Discussion of this evidence and the

further allegation, in no. 23375, of undue prejudice resulting from certain alleged "special concessions" granted southern producers in their inbound rates on coal, is reserved for the chapter dealing with no. 22052.

Section 13 allegation.—The complaint in no. 23375 alleges that the intrastate rates on coke accorded producers at Detroit and Wyandotte, an industrial suburb of Detroit, to destinations in the southern peninsula of Michigan un- [fol. 70] duly prefer those producers to the undue prejudice of complainants in violation of section 13 of the act. The lower level of rates applying from these allegedly preferred points as compared to rates from Chicago and Toledo is indicated clearly by exhibits of record. This rate disparity in a large measure is said to have excluded the producers at Chicago from the southern Michigan markets. Out of a total production of 1,250,000 tons of coke in 1929, they shipped only 24,364 tons to nearby destinations in Michigan and Indiana. The producers at Detroit, contending that the i.f.a. scale is reasonable and nonprejudicial, select 23 rates from Detroit to Michigan points averaging $1.51 to show that the present level closely approximates the i.f.a. scale, which, if applied to the same points, would produce an average rate of $1.55. On the other hand, the exhibit underlying appendix 1 indicates that under the i.f.a. scale, the rates from Detroit to Michigan generally would be increased and the rates from Chicago substantially reduced.

Complaint Cases Involving Rates from Central Territory to Western Trunk-Line Territory, Nos. 23173 and 23173 (Sub-No. 1)

The southern Ohio group of producers, by their complaints in nos. 23173 and 23173 (sub-no. 1), assail the present rates on coke from Ashland, Ironton, and Portsmouth (New Boston) to destinations in that portion of western trunk-line territory covered by the decision in the Indiana Coke case as unreasonable and unduly prejudicial as compared with the rates accorded competing producers at Chicago, Milwaukee, St. Louis, Terre Haute, and Indianapolis.

In the year ended March 31, 1928, the producers at Ashland and Ironton shipped the following tonnages to destinations in western trunk-line territory, including westbank Mississippi River points, covered by the complaints:

889 tons to Iowa, 1,092 tons to Minnesota, 2,525 tons to Missouri, 85 tons to Nebraska, and 62 tons to North Dakota. For the year ended March 31, 1929, the same plants shipped 4,519 tons of coke to destinations in Missouri, 1,106 tons of which went to west-bank Mississippi River points, and 84 tons to Kansas. These complainants assert that they are very much hampered in their endeavor to make sales in western trunk-line territory because of the lower level of rates accorded the producers at Indianapolis, Terre Haute, and the other points named.

Much of the evidence relied upon by these complainants in support of their position that the i.f.a. scale should apply throughout central territory is pertinent in the present cases in which they seek rates made in accordance with the w.t.l. scale. In appendix 6 there are set forth the present rates from the southern Ohio group and what they would be under the w.t.l. scale, and the rates from the five com- [fol. 71] peting points complained of, to a number of border-line destinations in Illinois territory, and to destinations in western trunk-line territory east of the Missouri River. These comparisons indicate that the southern Ohio producers are laboring under a considerable rate disadvantage. These producers urge that there are no traffic or transportation conditions to justify this difference in rates. They point to the fact that the average revenue ton-miles per mile of road of the class I lines operating in Ohio, Indiana, and zone A in southern Michigan for the year 1927 was 3,827,934 tons per mile of road operated and 2,787,220 tons per mile of main track operated; that the lines operating in Missouri, the State with highest traffic density in that portion of western trunk-line territory covered by the complaints, for the same year showed only 1,391,321 revenue tons per mile of road operated, and 1,264,039 tons per mile of main track operated. They further point to the heavy traffic densities of the Chesapeake & Ohio, Norfolk & Western, Detroit, Toledo & Ironton, and Baltimore & Ohio; which are not exceeded in the case of the Chesapeake & Ohio and the Norfolk & Western by any of the lines serving that part of western trunk-line territory covered by the complaints, and by only a few of the lines operating in that territory in the case of the other two carriers mentioned. These complainants also refer to the operating expenses of the carriers comprising the west-

ern district for the year 1929, which show an average operating expense per freight ton-mile of 7.61 mills, and an expense per ton of freight of $1.716. These expenses they contrast with those shown by the carriers operating in the Great Lakes region of 8.36 mills per freight ton-mile and $1.261 per ton of freight; and for the carriers operating in the central region, where their plants are located, of 7.19 mills per freight ton-mile and $1.101 per ton of freight.

The southern Ohio producers point out that the per car-mile return to the western trunk-line carriers under the w.t.l. scale rate for the average distance of all freight transported in the western district exceeds the average revenue per freight car-mile returned on all freight transported in that district, while the average return per ton-mile and per ton of coke under the w.t.l. scale rate for the average distance very closely approximates the average revenue per ton and per ton-mile return on all freight moved in that district in 1929. As coke is a low-grade commodity, complainants contend these comparisons demonstrate that the rates under the w.t.l. scale cannot be considered too low. Moreover, the earnings shown above on coke under the w.t.l. scale do not take into consideration the arbitraries which are to be added to the scale on hauls in arbitrary territory, as defined in the Indiana Coke case.

[fol. 72] The western trunk-line carriers concede that there is no justification for the maintenance of a higher level of rates from points in central territory east of the Illinois-Indiana State line than applies from origins within Illinois territory. Accordingly, these carriers joined with the central and southern territory lines in the motion previously mentioned to reopen the Indiana Coke case.

Acting upon the assumption that the scales prescribed in the Indiana Coke case would be reconsidered, Witness Flansburg of the Chicago & North Western submitted two tentative scales to illustrate the principle which he thinks should govern rates on coke from central territory to western trunk-line territory. These scales, referred to herein as the Flansburg scales, were constructed on the so-called "straight-line progression" theory which this witness considers more desirable than a "tapering progression." In scale II the rate of progression is approximately 73 cents per ton, or $22 per car, for every 100 miles. This rate of progression was derived in the following manner. The average length of haul of all carload freight on 49 repre-

sentative western railroads the witness found approximated 300 miles. A study made by this witness of the average weights and returns under the rates on all carload freight transported over 26 of these railroads indicated an average load of 29.98 tons, and an average car-mile yield of 31.68 cents. The average car of coke moving over the Chicago & North Western for the 10-year period 1920-1929 was found to approximate 30 tons. Assuming that coke should return more than the average of all freight, the witness concluded that the per car-mile revenue on that commodity for the average haul of 300 miles should be 33 cents. Taking as a starting point 300 miles and a per car-mile revenue of 33 cents on an average car of 30 tons, the revenue per car of coke for that distance was determined to be $99, or $3.30 per ton. The witness then apportioned the terminal expenses as one third of the total charge, or $33, which he deducted from the total carload return, leaving a balance of $66 per car to cover the charge for the line haul of 300 miles, or $22 per car for each 100 miles. The witness then constructed his scale by adding to the terminal cost of $33 per car an amount sufficient to yield approximately $22 per car for each 100 miles or less of line-haul distance, which is reduced to rates per ton by dividing by the average weight of 30 tons. Scale I is constructed in the same manner except that a terminal cost of $27 per car, or 90 cents per ton, is used, instead of $33, as the fixed charge upon which to build the scale.

Witness Flansburg refers to the fact that his scale II produces a rate of $1.83 per ton for 100 miles, and that the w.t.l. scale for this distance is $1.85; that at 200 miles the w.t.l. scale is $2.60 and at 300 miles $3.10, as compared with rates of $2.56 and $3.30 respectively, under his scale. It [fol. 73] will be observed that the w.t.l., i.f.a., and 1916 checking scales taper off and flatten out at the longer distances. In the southern class-rate revision we recognized this tendency as an attribute of all distance scales at the higher mileages. The rate of progression is much sharper on the shorter hauls. In the case of the w.t.l. scale, the progression flattens out at around 700 miles to a difference of $9 per car, or 30 cents per ton for each 100 miles; in the case of the i.f.a. scale this difference at 700 miles is $7.50 per car, or 25 cents per ton; and in the 1916 checking scale the same difference appears at 600 miles. In this connection the southern Ohio producers point out that a coke scale

progressed in the manner suggested by Witness Flansburg would result in a rate 16 per cent of the basic first-class rate prescribed in the western trunk-line class-rate revision for 100 miles, which is approximately the percentage relationship which the present w.t.l. scale bears to the basic first-class rates in western trunk-line territory, whereas at 800 miles the rate would be 22 per cent of the first-class rate prescribed for that distance. Thus, for an 800-mile haul a scale progressed in the manner suggested by this witness would be 38 per cent greater than the rate of progression for the first 100-mile block in its relation to the basic first-class rates in western trunk-line territory, which these complainants contend indicate excessive rates for the longer hauls. They refer to the fact that the history of the overhead rates between central territory and western trunk-line territory indicates that originally the rates were published on a straight-line progression, but that the carriers themselves, in April, 1879, abandoned that basis. As opposed to this method of constructing rates, complainants refer to the eastern and southern class-rate revisions, pointing out that in the latter case, after stating that line-haul costs are relatively greater for short hauls than for long hauls, and that the evidence submitted therein indicated that on traffic moving under class rates the proportion which is in carloads increases with distance, we concluded that: "The evidence submitted, therefore, confirms the theory that the rate per ton-mile should decrease with distance and be relatively high for the shorter hauls."

In support of their contention that the w.t.l. scale is too low, the western trunk-line carriers emphasize the failure of the carriers, particularly those operating in the western districts, to earn a fair return on their property investment. They show that for the years 1921 to 1929, inclusive, the rate of return to the class I carriers in the United States was 4.40 per cent, while for those operating in the western district the average return amounted to 4.00 per cent. Moreover, that during this period the return to the carriers [fol. 74] serving the northwestern region of the western district, in which region is located a considerable part of the destination territory covered by the complaints, averaged less than that for the district as a whole, or only 3.34 per cent.

Witnesses for the western trunk-line carriers contend that if the i.f.a. and w.t.l. scales are extended to apply from

the southern Ohio coke-producing group, it will result in rates on the longer hauls that are approximately the same as, and in some instances lower than, the rates contemporaneously in effect on coal from points in the Inner Crescent. For example, the rate under the i.f.a. scale from the southern Ohio group to Chicago would be $3.25 per ton on coke as compared with a coal rate from the Inner Crescent to Chicago of $3.09. Among other comparisons cited by the carriers are: To Rockford, Ill., the coke rate would be $3.70, the Inner Crescent coal rate $4.02; to the Mississippi River crossings of Burlington, Clinton, Rock Island, and Davenport the coke rates would be $3.90 under the i.f.a. scale, as compared with the Inner Crescent coal rate of $4.15. Complainants contend that these comparisons by the defendants are improper inasmuch as the southern Ohio coke-producing points on coal are grouped with the southern Ohio coal group and not the Inner Crescent group, which, on the average, is approximately 105 miles more distant to consuming points westerly than is the southern Ohio coke group. Complainants show, as illustrated in appendix 7, the amounts by which the coke rates from the southern Ohio group to representative destinations under the i.f.a. and w.t.l. scales would exceed the present coal rates from the Ohio coal fields to the same destinations, except where otherwise indicated. These exceptions are in the rates to certain points in Wisconsin and Mississippi River and Missouri River crossings.

Complainants also criticize defendants for comparing point-to-point rates on coke with group rates on coal. They call attention to the wide group adjustment in the coal rates from the Ohio and Crescent fields, and the grouping also of destinations in western trunk-line territory on coal. Thus, the rates on bituminous coal from the southern Ohio field are the same to Burlington, Rock Island, Hannibal, Quincy, and Keokuk, although the distance varies from 551 to 645 miles. The rate on coke under the i.f.a. scale from the southern Ohio coke ovens to these Mississippi River crossings would be 35 cents per ton in excess of the coal rate from the Ohio fields to Keokuk, and 10 cents in the case of Burlington.

Complainants also compare the rates on coal from southern Illinois and western Kentucky fields to various destinations in Illinois and western trunk-line territories with the corresponding rates on coke under the i.f.a. and w.t.l. coke

scales.. In every instance shown the coke rate is in excess [fol. 75] of the coal rate. Certain inconsistencies mentioned by defendants in connection with the comparison of coal and coke rates are the following: The rate on coke from Chicago to Janesville, Wis., under the i.f.a. scale is $1.65, whereas the rate on soft coal is $1.89; from Milwaukee the rate on coke to Janesville is $1.45, as compared with a rate on soft coal of $1.58; the rate from Milwaukee to Beloit, Wis., on coke is $1.65, and the rate on coal, $1.89. These inconsistencies appear to be due to the fact that the rates on coal from Milwaukee and Chicago are group rates applying from Lake Michigan ports as far north as Green Bay, Manitowoc, and Sheboygan. If the same basis were applied on coke the coke rate to Janesville would be considerably higher than the corresponding coal rate.

The Southern Complaint, No. 22052

Complainants in no. 22052 are the Alabama By-Products Corporation, the Gulf States Steel Company, the Central Iron and Coal Company, and the Woodward Iron ompany with plants located at Dolcito Junction (Tarrant), Alabama City, Holt, and Woodward, Ala., respectively. They assail the rates on coke from points in the Birmingham district to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan as unreasonable and unduly prejudicial as compared with the rates from certain specified origins in central territory and from Chattanooga, Tenn. Complainants propose a differential adjustment in the rates on coke to the Ohio River crossings as follows: Birmingham, 50 cents over Chattanooga to Cincinnati, instead of 79 cents as at present; Birmingham, 34 cents over Chattanooga to Louisville and Evansville as at present; and a rate parity between Birmingham and Chattanooga to Cairo, Ill., instead of the present difference of 34 cents in favor of Chattanooga. They suggest further that the i.f.a. scale be prescribed from the southern origins to points in the destination territory above described.

There are 1,388 by-product coke ovens in northern Alabama, with an annual producing capacity of almost 5,000,000 tons. Of the total movement of coke, 599,054 tons, shipped by the Alabama producers in 1929, excluding the Semet-Solvay Company, for which no data were shown, 297,185 tons, or 49.6 per cent, moved to southern destina-

tions, including the Ohio River crossings and Virginia cities, but excluding the Florida peninsula; 115,485 tons, or 19.3 per cent, moved to central territory, and 74,716 tons, or 12.5 per cent, to western trunk-line territory. Out of a total movement in 1929 of 20,931.95 tons to the Ohio River crossings from the Alabama origins, 8,243.45 tons moved from the Birmingham district to Cincinnati, 9,745.60 tons [fol. 76] moved to Louisville, and 2,377.65 tons moved to Evansville. During the same period Chattanooga shipped 7,392.40 tons to Cincinnati, 31.7 tons to Evansville, and none to Louisville. Further, the evidence discloses that the Chattanooga producer shipped only 55,458 tons into the four central States named in the complaint, mostly to Michigan destinations.

The rates on beehive coke have had the same marked effect upon the rate structure in the South as in the North. The first through rates published from southern origins to central territory were from the beehive ovens located in Wise County, Va. In August 1916, the rates therefrom were related to the rates then applying on beehive coke from the Connellsville region to central territory, following Stonega Coke & Coal Co. v. L. & N. R. R. Co., 39 I. C. C. 523, wherein the Connellsville-to-Chicago rate of $2.50 was prescribed from the Appalachia, Va., group to Chicago, the average distances from both groups approximating 575 miles. Chattanooga, being on a parity with Wise County to Cincinnati, likewise was accorded the Wise County rate to Chicago and to many key points in central territory. To some destinations the distance, Chattanooga over Connellsville, amounts to 248 miles. The Alabama complainants ask that they be given as favorable an adjustment as Chattanooga, emphasizing the fact that their production has far outstripped that of the Tennessee Products Corporation, at Chattanooga. The latter company is an intervener in this complaint and seeks to have its present adjustment of rates to central territory maintained. The Birmingham producers assert that they have joint rates to only a few of the important points in central territory, which are blanketed back toward the Ohio River, and ask that a general basis of through joint rates be established from Birmingham and Chattanooga on the same level that is prescribed for central territory.

We shall dispose, here, of the contention of the central-territory producers that Birmingham and Chattanooga have been unduly preferred by the lines serving those

points with a transit arrangement on coal, which they seek to have discontinued. More than 75 per cent of the coal entering into the coke produced in the Birmingham and Chattanooga districts comes from nearby mines in the States of Alabama and Tennessee. The southern carriers publish two, and sometimes three, specific intrastate rates on coal from the mines in the respective States of Alabama and Tennessee to the coking plants in these districts. One rate applies on coal consumed locally. Another and lower rate on coal converted into coke is secured by means of a refund of charges in excess of those at such lower rate when inbound billing of coal is surrendered to the same carrier covering an amount necessary to produce the outbound coke tonnage. [fol. 77] The rates on coke to the interstate destinations are published separately in tariffs on file with us, and are definite rates unrelated to the inbound-coal rates. At the time of movement of the coal inbound the producer has no knowledge as to the destination of the outbound tonnage of coke manufactured therefrom. It is not the intended destination of the coke that determines the measure of the rate inbound on the coal, but the fact that the carrier receives an outbound movement of coke produced from the inbound coal.

It is unnecessary to enter into a lengthy discussion of this situation since we believe that the decision of the United States Supreme Court in Arkadelphia Milling Co. v. St. L. S. W. R. Co., 249 U. S. 134, based upon somewhat similar facts, is determinative of the question. In holding that shipments of rough lumber material from the forest to the milling point over an intrastate route followed by shipments of the finished product to points outside the State did not constitute interstate commerce, the court stated:

• • • It is not merely that there was no continuous movement from the forest to points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility and value. The raw material came to rest at the mill and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average,—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that

95 per cent of it must be marketed outside of the State, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement.

Under the circumstances here shown of record, it would appear that we have no jurisdiction over the intrastate rates on coal from the mines in Alabama and Tennessee to the coke-producing plants in those States under the practice in vogue on the lines of the defendant carriers.

In appendix 5 there are reproduced the rates on coke from Birmingham and Chattanooga to numerous representative destinations in central territory to which the rates are alleged to be unreasonable, together with the rates from the alleged preferred points in central territory to the same destinations. These comparisons also show what the rates would be under the i. f. a. scale, using the method of computing distances prescribed in connection therewith, and under the carrier's proposed scale. In many instances the rates from Birmingham to central-territory destinations are made on combinations either over an Ohio River crossing or over Chattanooga. For an average distance of 273 miles to 83 representative destinations the present rates within central territory average $2.86; under the i. f. a. scale they would average $2.69; and under the proposed scale $3.02. [fol. 78] From Birmingham the average rate is $5.03, or 66 cents higher than from Chattanooga, for an average difference in distance of 100 miles. Under the carriers' proposed scale the average rate from Birmingham would be $4.51, and from Chattanooga $4.24, while under the i. f. a. scale the average rate from Birmingham would be $4.28 and from Chattanooga $3.93.

The position of the Birmingham producers with respect to their request for the prescription of rates from northern Alabama to central territory on the level of the i. f. a. scale is founded upon three main grounds: (1) That the traffic conditions encountered in the movement of coke traffic from Birmingham and Chattanooga to the Ohio River crossings are just as favorable as those obtaining in central territory, (2) that the coke-rate level in the South is lower than that in central territory, and (3) that the highly competitive conditions surrounding the marketing of coke require that uniform rates be extended all competing producers.

The carriers serving the northern Alabama producers, and which originate more than 10 per cent of the coke traffic in the South, are the Louisville & Nashville Railroad, the Alabama Great Southern Railroad, the Cincinnati, New Orleans & Texas Pacific Railway, the Illinois Central Railroad, the Mobile & Ohio Railroad, and the Nashville, Chattanooga & St. Louis Railway. Complainants show that the traffic density in 1928 on these roads in freight revenue per mile of road operated in freight service was $21,932 as compared with $34,866 for 32 roads operating in central territory. In ton-miles per mile of road the density was 2,464,412 as against 3,547,653 for central territory. However, the northern interests calculate that, if the central-territory lines originating less than 10 per cent of the traffic be eliminated, the freight revenue per mile of road would be $38,472 and the ton-miles per mile would be 3,940,910. On the basis of miles of all track the freight revenue on the six southern carriers was $12,651 per mile as compared to $15,991 in central territory, and the ton-miles per mile were 1,421,509 as against 1,627,118 in central territory. The traffic density as to revenue per mile of all tracks of the Cincinnati, New Orleans & Texas Pacific exceeded that of all but three of the 32 central-territory roads shown, and that of the Louisville & Nashville was greater than that of 10 of the 32 central-territory roads. The northern interests criticize the study of traffic density per mile of track, contending that it should be based on miles of main line, pointing out that in central territory the miles of yard and passing tracks are substantially greater in proportion to main tracks than in southern territory. The traffic density in Kentucky in 1927, which is weighted heavily with density on lines not handling coke traffic, was shown to be in excess of that of Ohio, Indiana, [fol. 79] Illinois, Wisconsin, and the southern peninsula of Michigan. That of Alabama and Tennessee was less than in Ohio, Indiana, Michigan, and Illinois. Complainants also show that on the Louisville & Nashville, which handles approximately 86 per cent of the coke from northern Alabama to the Ohio River, the expense per freight ton-mile in 1929 was less than that of 38 of 48 carriers operating in central territory.

The northern interests compare the traffic density of central territory with southern territory as a whole, showing that in 1927 the revenue per ton-mile of road operated in freight service in the former, including in southern terri-

tory the Chesapeake & Ohio Railway, Norfolk & Western Railway, and Virginian Railway, was 82 per cent in excess of that in the latter, and the excess in revenue per ton-mile of main track was 53.8 per cent. Excluding these roads, the excess of central over southern territory would be 108.6 per cent per mile of road and 75 per cent per mile of main track.

The Alabama complainants submitted an analysis of the charges paid on all shipments of coke which moved in 1929 from the Alabama producers, excluding the Semet-Solvay Company, to destinations in southern-classification territory, excepting the peninsula of Florida. These they compare with charges that would have accrued if based on the i. f. a. scale of rates to the same destinations. Complainants point out that the revenues of the southern carriers would have been increased 5.59 per cent on the shipments considered, and the rates 11 cents per ton on a weighted average, had the i. f. a. scale of rates been in effect in southern territory, from which they conclude that the level of rates on coke in southern territory is 5 per cent lower than the i. f. a. scale. The rates on shipments made from Chattanooga to southeastern and Carolina territories for 1929 average $2.02 per ton, whereas if charges had been collected on basis of the i. f. a. scale of rates the average rate would have been $2.36, an increase of 34 cents per ton. Similar computations of the Chattanooga producer covering 55,458 tons of coke which moved to central and Illinois territory in the same year, mostly to Michigan, showed a weighted-average charge of $3.71 per ton. Had the i. f. a. scale rates applied from origin to destination of each shipment, the weighted-average charge would have been $4.08, an average increase of 37 cents per ton, or $20,733.71, on the shipments considered.

As previously stated, the Indiana interests suggest, as a means of removing the alleged undue prejudice, that through rates from southern origins to central territory should be constructed on the basis of proportional rates 20 per cent higher than the i. f. a. scale for the portion of the movement from the Alabama origins to the Ohio River crossings, and the i. f. a. scale rate for the balance of the haul within central territory. For instance, the rates from Chat- [fol. 80] tanooga and Birmingham to Indianapolis, now $3.91 and $4.30 respectively, would be increased under the Indiana producers' proposal to $4.10 and $4.45 respectively. To Muncie the $3.91 and $4.30 rates from the southern

origins would be increased to $4.15 from Chattanooga and $4.55 from Birmingham. In criticism of this study the southern interests point out that it contemplates the rate structure in the South as a whole and does not accurately reflect the favorable transportation conditions obtaining over the southern lines that actually perform the service on traffic from Birmingham and Chattanooga, to central territory. Southern producers insist that there is no evidence of record showing that the actual transportation cost on this traffic is 20 per cent greater for the haul south of the Ohio River than north thereof. It is noteworthy, in connection with the question of undue prejudice, to observe that the disadvantages under which the central-territory producers labor in meeting competition from Birmingham and Chattanooga are due in no small measure to their higher cost of production. Birmingham producers can and do sell coke in central territory at $3.20 to $3.50 per ton f. o. b. origin, which prices are even below the cost of production at Indianapolis and Terre Haute, ranging from $6 to $7 per ton. This disadvantage in production cost cannot be corrected by us.

The comparisons shown in appendix 5 indicate the favorable adjustment which has been accorded Chattanooga over Birmingham in rates to central territory. A revenue test based on 1929 shipments shows that on the 115,485 tons shipped to central territory from Birmingham, the present rates yielded $510,699, as against $476,441 under the i. f. a. scale, showing that from Birmingham the present rates on a weighted average are 29 cents higher than the i. f. a. scale rates. From Chattanooga, the revenue under the present rates was $205,560, as against $226,294 under the i. f. a. scale, the present rates being 37 cents less than i. f. a. scale rates on a weighted-average basis. The advantage enjoyed by Chattanooga over Birmingham is indicated further by the rates on coke from these origins to the Ohio River crossings as follows:

To—	From Chattanooga, Tenn.			From Birmingham, Ala.			Differentials, Birmingham over Chattanooga		
	Distance	Present rate	Rate under i.f.a. scale	Distance	Present rate	Rate under i.f.a. scale	Distance	Present	Under i.f.a. scale
	Miles	Cents	Cents	Miles	Cents	Cents	Miles	Cents	Cents
Cincinnati, Ohio..	338	259	300	481	338	370	143	79	70
Louisville, Ky.....	315	259	290	392	293	325	77	34	35
Evansville, Ind...	308	259	290	361	293	320	53	34	30
Cairo, Ill.....	344	259	310	330	293	300	[1] 14	34	[1] 10

[1] Birmingham less than Chattanooga.

[fol. 81] This adjustment resulted from the relation of Chattanooga to Wise County, Va., as extended by the so-called "Cooley award."

In support of their request for differentials of 50 cents over Chattanooga to Cincinnati the Alabama complainants instance numerous rates on coke to the South and Southwest where the advantage in distance favors Birmingham by an average of 101 miles and Chattanooga has rate differentials averaging only 23 cents over Birmingham. However, in our opinion the question of the relationship between Chattanooga and Birmingham in rates to the South and Southwest has but slight bearing upon the relationship which Birmingham should bear to Chattanooga in the rates to central territory.

Much of the evidence relied on by complainants in No. 22052 in support of their request for the establishment of rates computed on the basis of the i. f. a. scale, and their request for a differential of 50 cents over Chattanooga in rates to Cincinnati is similar to that considered by division 3 in Semet-Solvay Co. v. Birmingham Southern R. Co., 167 I. C. C. 79. The rates resulting from that decision emphasize the lack of consistency in many of the existing rates from the Birmingham district to southern Michigan and northern Ohio. The rate from Birmingham to Lansing, 762 miles, is $5.16 as compared to the rate of $4.91 approved from the same origin to Grand Rapids and Muskegon, 764 and 792 miles respectively. The rate from Chattanooga to all three of these destinations is $4.16. The rate from Birmingham to Cleveland, 724 miles, is $6.03 as compared to the rate of $4.65 approved from Birmingham to Detroit, 742 miles. The differential of the Birmingham-to-Cleveland rate over that from Chattanooga is $1.75, as contrasted to the differential of $1 approved in the above case to similar territory. These rate anomalies result from the relation of the rates from Chattanooga to the rates from the Connellsville district, and the failure to relate the rates from Birmingham to those from Chattanooga.

The Omaha Complaint, No. 23160 (Sub-No. 1)

Complainant in No. 23160 (sub-No. 1) is a municipal corporation engaged in the manufacture of water gas for the city of Omaha. It seeks reparation on numerous shipments of coke which moved since February 28, 1928, from Dolcito

Junction to Omaha, alleging that the rate of $6.01 charged was unreasonable. The shortest rail distance from Dolcito Junction to Omaha is 895 miles by way of the Illinois Central to Cairo, Ill., the Missouri Pacific to St. Louis, Mo., the Wabash to Mexico, Mo., the Chicago & Alton to Clark, Mo., the Wabash to Council Bluffs, Iowa, and the Union Pacific beyond. Not only does this route involve short hauling of the Wabash, but as applied to shipments from Dolcito Junc- [fol. 82] tion, it would require delivery through a switching movement from the Louisville & Nashville, the initiating line, to the Illinois Central at Birmingham. The shortest available route from Dolcito Junction to Omaha is 940 miles by way of the Louisville & Nashville to East St. Louis, and the Wabash beyond, while the average of all available routes is 1,080.7 miles. However, complainant has used 890 miles, the short-line distance from Birmingham proper to Omaha, for rate comparisons. For this distance the $6.01 rate applicable from the Birmingham district yields a return of 6.75 mills per ton-mile and 22 cents per car-mile, based on the average weight of 65,298 pounds for 10,033 cars received from one producer by this complainant. Complainant seeks a rate not to exceed $5.

In support of its contention that the $6.01 rate charged was unreasonable complainant submitted a number of comparisons with rates applying on coke from Birmingham to various interstate destinations, showing in connection therewith the differences by which the rates compared exceed or are less than rates applicable for like distances under the w. t. l. and i. f. a. scales. Some of these comparisons are reproduced herewith:

From Birmingham, Ala., to—			Rate would be, under w.t.l. scale			Rate would be, under i.f.a. scale		
	Rate Cents	Distance Miles	Rate Cents	Minus Cents	Plus Cents	Rate Cents	Minus Cents	Plus Cents
Omaha, Nebr.....	601	890	540	61	...	495	106	...
St. Louis, Mo.....	396	479	400	...	4	360	36	...
Chicago, Ill.....	430	647	460	...	30	415	15	...
Detroit, Mich.....	465	737	490	...	25	445	20	...
Indianapolis, Ind....	430	502	420	10	...	380	50	...
Toledo, Ohio.....	440	678	380	60	...	345	95	...
Eagle Pass, Tex.....	696	1,033	590	106	...	545	151	...

Using the distances over the shortest available route, 940 miles, and the average of all available routes, 1,080.7 miles, the rates under the w. t. l. scale extended would be $5.60 and $6.10 respectively. Similar comparisons were submitted by

complainant with rates on petroleum coke from Texas origins and Shreveport, La., to Omaha and other Missouri and Mississippi River crossings. Also, by the use of the Lorenz formula complainant endeavors to show that the cost of movement of an average car of coke, weighing 32.4 tons, from Birmingham to Omaha, with a return of 5.75 per cent on the book investment of the carriers involved in the movement, should not exceed $5.25 for the short-line route from Birmingham and $5.47 from Dolcito Junction. The impracticability of the use of the Lorenz formula in determining the measure of the rate for a single commodity is discussed in Western Trunk Line Class Rates, 164 I. C. C. 1, 187.

[fol. 83] From Birmingham, Omaha takes a group rate which applies to a territory comprising the major part of the State of Iowa, and a small portion of northwestern Missouri. Des Moines, Iowa, is the approximate center of the group, and Omaha is one of the farthest distant points in the group. The distances from Birmingham to points on the northern border of the group, such as Fort Dodge and Mason City, approximate 887 miles, while to points on the southern border of the group the distances are around 690 miles. To destinations in groups south and east of this group the rates from Birmingham are lower. For example, from Birmingham to Burlington and Clinton, Iowa, Mississippi River crossings, and to Middletown, Iowa, the rates are $5.29, to Peoria, Ill., $4.62, to Chicago $4.30, and to Kansas City $5.29.

Comparisons of the $6.01 rate assailed with the rates to the last-named points, and with those shown in the foregoing table are not indicative, in our opinion, of the unreasonableness of the rates charged this complainant. The yield of 6.7 mills per ton-mile returned on the $6.01 rate for the short-line distance from Birmingham to Omaha compares favorably with the earnings under other rates from Birmingham to the other important destinations in the same general territory. For example, the revenue under the $3.96 rate from Birmingham to St. Louis, 479 miles, is 8.2 mills; under the rate of $5.29 to Kansas City, 723 miles, the yield is 7.3 mills; and to Sioux City, Iowa, 992 miles from Birmingham, a rate of $7.20 applies under which the revenue is 7.3 mills.

Under the decision in the Warren Coke Case, the rates from Birmingham to Omaha and the upper Missouri River

cities were found to be unduly preferential of the producers at Birmingham to the undue prejudice of producers at St. Louis where the difference between the rate from St. Louis and Birmingham to the upper Missouri River cities was less than $2.64. The present rate from St. Louis to Omaha is $3.70, which resulted from the decision in the Indiana Coke case. A differential of $2.64 added thereto makes a rate of $6.34. The rate on pig iron, Birmingham to Omaha, is $7.69 per gross ton and on pipe $10.15 per gross ton. These rates range from 185 to 235 per cent of the rates on the same commodities from St. Louis to Omaha, while the assailed rate of $6.01 is only 163 per cent of the rate on coke from St. Louis to Omaha.

Conclusions

From the evidence as a whole we are not convinced that either the Seaboard scale or the rates prescribed years ago from Connellsville provide a satisfactory basis for a coke-rate adjustment for central territory. The circumstances attending their determination, the lack of a substantial [fol. 84] movement of traffic thereunder, and the subsequent revolutionary development of the coke industry in central territory impair their value for comparative purposes.

Although the expressed purpose of the suspended rates is to secure a uniform adjustment without materially increasing or decreasing present revenue, the carriers have submitted voluminous evidence showing their need for more revenue. Had they likewise shown as a corollary to this a detailed analysis of the tonnage affected by the proposed adjustment, we could approach this problem of aggregate revenue with more assurance. The tonnage contemplated by respondents' revenue study indicates an annual movement within central territory of approximately 4,340,000 tons, which is less than one-half of the amount, 10,673,262 tons, reported in our freight commodity statistics as originating in the Great Lakes and central-eastern regions in 1930. Despite the fact that these regions are not exactly coextensive with central territory, the discrepancy is great enough to cast doubt on the completeness of the revenue study. However, it is stated that the proposed schedules as applied to a movement of more than 2,000,000 tons would increase the present revenue 1.4 per cent. The increase would be more pronounced if the scale were ap-

plied also to distances below 30 miles. Contrary to this is the result of a study made by protestants, reproduced in a preceding table, affecting approximately one-fourth of the tonnage used by the respondents, which study shows a revenue increase under the proposed rates applied to all distances of approximately 12 per cent. These figures are supported by a detailed analysis of the tonnage affected. Although a complete study is lacking, the increases resulting in the rates from the various producing points as detailed in the preceding pages indicate that the net increase produced by the suspended schedules would substantially exceed that claimed for them by respondents.

The comparisons with earnings on other commodities submitted both in support of and against the proposed schedules, are rather inconclusive. By the simple expedient of choosing heavy or light loading commodities either high or low earnings may be demonstrated. Upon the record before us we conclude that the proposed schedules have not been justified.

In our opinion, the scale finally adopted should not fall below the i. f. a. scale. As far as precedents go, it represents our latest judgment as to a reasonable and nondiscriminatory coke-rate adjustment in Illinois territory which includes a portion of central territory. Of the scales discussed, it provides the most uniform rate of progression in relation to eastern first-class rates. And while the [fol. 85] preservation of present revenue is not the controlling factor, the evidence as a whole would seem to indicate that the i. f. a. scale would come nearest to achieving that result. We are not impressed with the contention of the carriers that the i. f. a. scale will tend to break down the coal-rate structure from the Inner Crescent fields. The comparisons intended to show this effect deal largely with group rates on coal as compared with point-to-point rates on coke. When they are viewed on a comparative basis it appears that the coke rates are higher, mile for mile.

On oral argument, counsel for the short-haul shippers who advocate the Petersen scale, stated that they would be satisfied with the examiner's scale (appendix 2). Respondents stated on exceptions that they would be content with 17.5 per cent of eastern first-class rates. From 5 to 150 miles, the range of distances in which most of the short-haul shipments move, the examiner's scale closely approximates the i. f. a. scale. Therefore, if the i. f. a. scale pro-

gresses properly from 150 miles up, these short-haul shippers would have no just cause for complaint if rates made thereunder were accorded the long-haul shippers. The i. f. a. scale progresses more rapidly than 16 per cent of the eastern first-class rates. Therefore, its rate of progression cannot be said to be too low.

Assuming that the i. f. a. scale would iron out the difficulties as between the long-haul and short-haul shippers, we must next consider it from the carriers' point of view. The evidence is not conclusive that the i. f. a. scale would preserve existing revenue. A review of the numerous rates exhibited indicates that in many instances that scale would reduce present rates. Also, the revenue studies submitted by respondents show a decrease under the i. f. a. scale of 4.9 per cent in the revenue on more than 2,000,000 tons. It is practically certain that a substantial decrease would result if the i. f. a. scale were applied in connection with the shortest routes, which respondents propose to use. Since they have computed these distances at considerable cost, there appears no reason why they should be required to compute distances over the 3-line routes under the formula of the i. f. a. scale. Under these circumstances, it would appear proper to prescribe a scale applicable to the shortest distances that would approximate the i. f. a. scale, plus additions where necessary to compensate for the loss of distance caused by the substitution of the shortest routes for the 3-line routes now used in connection with the i. f. a. scale. With this purpose in view, and by making adjustments to achieve a uniformity of progression, we have derived the scale appearing in appendix 8, column 2, which, in our opinion, will provide a maximum reasonable and nonprejudicial adjustment of rates for application in central and Illinois territories.

[fol. 86] In our judgment, a scale for application from central and Illinois territories to western trunk-line territory zone 1 should bear the same approximate relationship to the basic scale prescribed for central and Illinois territories as the present western trunk-line coke scale bears to the present i.f.a. scale. Likewise, arbitraries for application beyond zone 1 may be reasonably constructed by the same method used in the Indiana Coke case. Such a scale and arbitraries appear in appendix 8, columns 3 and 4, respectively.

We have recognized in numerous cases that from a rate-making standpoint southern territory is rated higher than central territory. The evidence of record indicates that the traffic density in the former is substantially less than in the latter. Where we have prescribed interterritorial rates that did not reflect this difference, special circumstances surrounding the traffic accounted for the exception. The evidence presented by the southern producers shows that the northern carriers selected have an advantage in traffic density over the six southern roads named of approximately 58 per cent in terms of freight revenue per mile of road operated, and approximately 26 per cent per mile of all tracks. As to ton-miles per mile of road operated, the advantage approximates 43 per cent, and per mile of all track, 14 per cent. If the comparison be limited to carriers originating more than 10 per cent of the traffic, the record shows that the excess of the northern lines in revenue per mile of road is 75 per cent, and in ton-miles per mile of road, 59 per cent. It is true that the traffic density on the Louisville & Nashville and the Cincinnati, New Orleans & Texas Pacific, which haul a large portion of this traffic, compares favorably with that on lines in central territory. But in fixing interterritorial rates due consideration must be given to the adjustment as a whole, else by piecemeal revision the whole structure will be undermined. The objective must be such uniformity as will be conducive to the widest competition among shippers in a given territory, and the preservation of carrier revenue predicated upon recognized differences in territorial rate levels. Rates made to correspond closely to traffic density on particular lines would render impossible the achievement of this result.

The fact that the present untreated coke-rate structure in the South is lower than in central territory has no special significance in the determination of maximum reasonable interterritorial rates. The southern carriers indicated their intention to revise these rates, which are lower in many instances than rates approved by us on coal. In our opinion, the scale shown in appendix 8, column 3, will provide maximum reasonable and nonprejudicial coke rates from the southern origins in issue to central territory.

[fol. 87] With respect to the section 13 allegation regarding intrastate rates on coke within Michigan, it is our conclusion that the lower level thereof, as compared with the interstate rates on coke to the same destinations, tends to

confirm the charge of discrimination against interstate traffic in coke to the same destinations. However, we shall for the present trust the matter of adjusting the intrastate rates to the basis herein approved to the State commission of Michigan. If the matter be not adjusted to the satisfaction of the parties in interest, it may be brought to our attention by an appropriate application.

The question of undue prejudice arises in connection with all of the complaints except no. 23160 (sub-no. 1). These allegations are rather general in nature and are supported in the main merely by a statement of the differences in the rates. Where the question was dealt with more in detail the proof is at best indefinite, and in our opinion insufficient to support a finding of undue prejudice. It is believed that the establishment of the rates hereinafter prescribed as maximum reasonable will remove any prejudice that may exist in the assailed rates.

With respect to the complaint against the rate from Birmingham to Omaha, we conclude that the present rate was not and is not unreasonable.

Findings

We find:

1. That the schedules under suspension in Investigation and Suspension Docket No. 3511 have not been justified.

2. That the interstate rates on coke, in carloads, between points in central territory and Illinois territory, assailed in nos. 23173, 23173 (sub-no. 1), 23375, 23375 (sub-no. 1), and 23888 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates based on the distance scale set forth in appendix 8, column 2, except that to destinations in Michigan zone C the rates should be based on the distance scale set forth in appendix 8, column 3, which rates we find are, and will be, reasonable.

3. That the rates on coke, in carloads, from Ashland, Ky., and Ironton and Portsmouth (New Boston), Ohio, to destinations in Wisconsin, except that portion in Illinois territory, Iowa, Missouri, Nebraska, South Dakota, and Minnesota, assailed in nos. 23173 and 23173 (sub-no. 1) were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, (a) to

destinations in zone 1 and extended zone C in Wisconsin of western trunk-line territory as described in Western Trunk-[fol. 88] Line Class Rates, 164 I. C. C. 1, 200, 210, rates based on the distance scale set forth in appendix 8, column 3, and (b) to destinations west and south of zone 1, rates based on that scale applied to the entire distance, plus the distance arbitraries set forth in appendix 8, column 4, for application to that part of the hauls west and south of zone 1, which rates we find are, and will be, reasonable.

4. That the rates on coke, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan assailed in no. 22052 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates based on the distance scale set forth in appendix 8, column 3, which rates we find are, and will be, reasonable.

5. That in applying the scales herein found reasonable distances should be computed over the shortest possible routes via existing connections for the interchange of carload traffic without transfer of lading, and specific point-to-point rates should be published.

6. That the rate on coke, in carloads, from Birmingham, Ala., to Omaha, Nebr., assailed in no. 23160 (sub-no. 1) was not and is not unreasonable. The complaint will be dismissed.

7. That the findings and order in no. 16243, Indiana Coke & Gas Co. v. Ahnapee & W. Ry. Co., should be, and hereby are, vacated insofar as they conflict with the findings and order made herein.

8. Subsequent to the hearings in these cases a petition was filed on behalf of the Cincinnati, Georgetown Railroad Company, named as a party defendant in nos. 22052, 23375, 23375 (sub-no. 1), and 23888, praying that it be excepted from the orders in those cases if they require the establishment of joint rates on coke throughout central territory, for the reason that in Ohio Farm Bureau Corp. v. Akron & B. B. R. Co., 171 I. C. C. 182, division 3 found, among other things, that commodity rates consisting of combinations of separately established factors to and from Cincinnati and points on the line of the Cincinnati, Georgetown Railroad

Company were not unreasonable or unduly prejudicial, and that in Eastern Class Rate Investigation, 177 I. C. C. 156, this carrier was exempted from finding 13 in that case, and also in Application of Mississippi Valley B. L. Co., 178 I. C. C. 224, from the findings therein concerning the application of the Mississippi Valley Barge Line for through routes and joint rates. This petition is granted, and the Cincinnati, Georgetown Railroad Company will be exempted from the publication of joint rates on coke to or from points on its line.

9. To the rates prescribed herein may be added the emergency charges authorized in Ex parte 103.

[fol. 89] Our findings herein are not to be construed as precluding reasonable groupings.

Respondents filed no formal application for fourth-section relief, but at the hearing they requested temporary relief to establish the rates over all reasonable routes, with the understanding that appropriate applications would be filed after the rates became effective. In those instances where it is required, temporary fourth-section relief from the long-and-short-haul provision of the act for a period of six months will be granted. If within five months from the date of the establishment of the rates herein prescribed, application be filed in accordance with rule XVIII of our Rules of Practice for authority to continue any rates under fourth-section relief beyond the six months' period, such rates may be continued in effect until the application shall have been passed upon.

Appropriate orders will be entered.

Appendix 1

(1) To—	(2) From—	(3) Distance (miles)	(4) Present rate	(5) I. and S. 3511 proposed scale	(6) Petersen proposed scale	(7) I.f.a. scale	Advance or reduction using— (8) Column 5 basis	(9) Column 6 basis	(10) Column 7 basis
Detroit	Chicago	267	$2.52	$3.02	$2.85	$2.70	+$0.50	+$0.33	+$0.18
	Detroit	...	.....	.....	.....	.....	.....	.....	.....
	Toledo	56	1.23	1.51	1.20	1.35	+.28	−.03	+.12
	Terre Haute	321	3.00	3.28	3.15	3.00	+.28	+.15	0
	Painesville	192	2.52	2.65	2.30	2.35	+.13	−.22	−.17
	Ashland	303	3.02	3.15	3.05	2.90	+.13	+.03	−.12
	Pittsburgh	291	3.40	3.15	2.95	2.80	−.25	−.45	−.60
	Youngstown	229	2.65	2.90	2.55	2.50	+.25	−.10	−.15
South Bend	Chicago	86	1.76	1.89	1.55	1.65	+.13	−.21	−.12
	Detroit	182	2.14	2.65	2.30	2.35	+.51	+.16	+.21
	Toledo	148	1.94	2.39	2.00	2.10	+.45	+.06	+.16
	Terre Haute	182	2.15	2.65	2.30	2.35	+.50	+.15	+.20
	Painesville	284	2.90	3.15	2.95	2.80	+.25	+.05	−.10
	Ashland	344	3.65	3.40	3.35	3.10	−.25	−.30	−.55
	Pittsburgh	377	3.65	3.65	3.55	3.20	0	−.10	−.45
	Youngstown	318	2.90	3.28	3.15	2.90	+.38	+.25	0
Chicago	Chicago	...	.....	.....	.....	.....	...	...	...
	Detroit	267	2.65	3.02	2.85	2.70	+.37	+.20	+.05
	Toledo	230	2.65	2.90	2.55	2.55	+.25	−.10	−.10
	Terre Haute	178	2.25	2.52	2.15	2.25	+.27	−.10	0
	Painesville	361	2.90	3.53	3.45	3.20	+.63	+.55	+.30
	Ashland	398	3.91	3.65	3.65	3.25	−.26	−.26	−.66
	Pittsburgh	454	3.65	4.03	3.75	3.55	+.38	+.10	−.10
	Youngstown	395	2.90	3.65	3.65	3.25	+.75	+.75	+.35

Appendix 1—Continued

(1)	(2)	(3)	(4)	(5)	(6)	(7)	Advance or reduction using—		
				I. and S. 3511			(8)	(9)	(10)
To—	From—	Distance (miles)	Present rate	proposed scale	Petersen proposed scale	I.f.a. scale	Column 5 basis	Column 6 basis	Column 7 basis
St. Louis	Chicago	279	2.70	3.15	2.85	2.70	+.45	+.15	0
	Detroit	475	4.03	4.03	4.05	3.60	0	+.02	−.43
	Toledo	431	3.65	3.91	3.85	3.45	−.25	+.20	−.20
	Terre Haute	166	2.25	2.52	2.15	2.25	−.12	−.10	0
	Painesville	550	3.65	4.16	4.45	3.90	+.51	+.80	+.25
	Ashland	484	4.03	4.03	4.15	3.70	0	+.12	−.33
	Pittsburgh	604	4.16	4.41	4.75	4.10	+.25	+.59	−.06
	Youngstown	577	3.65	4.28	4.55	4.00	+.63	+.90	+.35
Milwaukee	Chicago	85	1.65	1.89	1.55	1.65	+.24	−.10	0
	Detroit	269	2.77	3.02	2.85	2.70	+.25	+.07	−.07
	Toledo	283	2.77	3.28	2.95	2.80	+.51	+.18	...
	Terre Haute	263	2.70	3.02	2.75	2.70	+.32	+.05	0
	Painesville	419	.....	.....	.....	.....	...	...	...
	Ashland	483	.....	.....	.....	.....	....	...	...
	Pittsburgh	539	4.16	4.16	4.35	3.90	0	+.19	−.26
	Youngstown	456	4.03	4.03	3.95	3.55	0	−.08	−.48
[fol. 90]									
Akron	Ashland	253	2.52	2.90	2.75	2.65	+.38	+.23	+.13
	Erie	126	2.14	2.27	1.85	1.95	+.13	−.29	−.19
	Hamilton	220	2.52	2.77	2.45	2.45	+.25	−.07	−.07
	Painesville	72	1.51	1.64	1.40	1.55	+.13	−.11	+.04
	Pittsburgh	116	2.27	2.14	1.70	1.80	−.13	−.57	−.47
	Toledo	123	2.14	2.27	1.85	1.95	+.13	−.29	−.19
	Youngstown	51	1.51	1.51	1.20	1.35	...	−.31	−.16

Erie	Ashland	355	3.53	3.40	3.35	3.10	−.13	−.18	−.43
	Erie	...	.....	.....	.....	.....	...	...	...
	Hamilton	313	3.78	3.65	3.15	2.90	−.13	−.63	−.88
	Painesville	66	1.26	1.64	1.30	1.45	+.38	+.04	−.19
	Pittsburgh	146	2.39	2.02	2.00	2.10	−.37	−.39	−.29
	Toledo	202	2.52	2.77	2.45	2.45	+.25	−.07	−.07
	Youngstown	89	1.51	1.89	1.55	1.65	+.38	+.04	+.14
Buffalo	Ashland	304	3.91	3.91	3.05	2.90	...	−.86	−1.01
	Erie	87	1.76	1.89	1.55	1.65	+.13	−.21	−.11
	Hamilton	399	3.78	3.65	3.65	3.25	−.13	−.13	−.53
	Painesville	153	2.14	2.39	2.00	2.10	+.25	−.14	−.04
	Pittsburgh	232	2.65	2.90	2.55	2.55	+.25	−.10	−.10
	Toledo	287	3.02	3.15	2.95	2.80	+.13	−.07	−.22
	Youngstown	175	2.39	2.52	2.15	2.25	+.13	−.24	−.14
Wheeling	Ashland	230	3.02	2.77	2.55	2.55	−.25	−.47	−.47
	Erie	187	.....	.....	.....	.....	...	...	...
	Hamilton	245	3.39	2.90	2.65	2.65	−.49	−.74	−.74
	Painesville	170	2.39	2.39	2.15	2.25	...	−.24	−.14
	Pittsburgh	60	1.89	1.51	1.20	1.35	−.38	−.69	−.54
	Toledo	207	2.65	2.65	2.45	2.45	...	−.20	−.20
	Youngstown	106	2.02	1.51	1.70	1.80	−.51	−.32	−.22

Appendix 2

Distance	Examiner's proposed scale	I.f.a. scale	Carrier's proposed scale	Petersen proposed scale	16 percent of eastern first class	17.5 percent of eastern first class	W.t.l. scale	Seaboard scale
	Cents	Cents	Cents	Cents	Cents	Cents	Cents	Cents
10 miles and under	95	90	101	...	100	100	100	113
20 miles and over 10	100	100	101	...	100	120	110	126
30 miles and over 20	110	110	113	90	120	120	120	139
40 miles and over 30	120	120	126	100	120	140	130	151
50 miles and over 40	130	130	139	110	140	160	140	164
60 miles and over 50	...	135	151	120	140	160	150	176
65 miles and over 50	140	...	...	...	...	...	...	...
70 miles and over 60	...	145	164	130	160	180	160	189
80 miles and over 65	150	155	176	140	160	180	170	202
90 miles and over 80	...	...	189	...	180	180	...	214
100 miles and over 80	165	165	202	155	180	200	185	227
120 miles and over 100	180	180	214	170	200	220	200	252
140 miles and over 120	195	195	227	185	200	220	215	265
160 miles and over 140	210	210	239	200	220	240	230	...
180 miles and over 160	225	225	252	215	220	240	245	...
200 miles and over 180	240	235	265	230	240	260	260	290
220 miles and over 200	...	245	...	245	240	260	270	...
225 miles and over 200	255	...	277	...	...	...	...	302
235 miles and over 220	...	...	...	255	...	...	...	...
240 miles and over 220	...	255	...	...	260	280	280	...
250 miles and over 225	270	...	290	265	...	...	...	315
260 miles and over 240	...	265	...	...	260	280	290	...
265 miles and over 235	...	...	...	275	...	...	...	...

275 miles and over 250	285	...	302	...	...	...	...	328
280 miles and over 260	...	270	...	285	260	300	300	...
295 miles and over 280	...	...	...	295	...	...	...	...
300 miles and over 275	300	280	315	...	280	300	310	340
310 miles and over 295	...	...	...	305	...	...	...	...
320 miles and over 300	...	290	...	...	280	320	320	...

[fol. 91]

325 miles and over 300	...	...	328	315	...	...	...	...
330 miles and over 300	315	...	...	...	...	...	...	...
340 miles and over 320	...	300	...	325	300	320	330	...
350 miles and over 325	...	...	340	...	...	...	...	365
355 miles and over 340	...	...	...	335	...	...	...	...
360 miles and over 330	330	310	...	...	300	320	340	...
370 miles and over 350	...	...	...	345	...	...	...	...
375 miles and over 350	...	...	353	...	...	...	...	...
380 miles and over 360	...	320	...	...	300	340	350	...
385 miles and over 370	...	...	...	355	...	...	...	...
390 miles and over 360	345	...	...	...	...	...	...	...
400 miles and over 380	...	325	365	365	320	340	360	391
420 miles and over 390	360	335	...	375	320	360	370	...
425 miles and over 400	...	...	378	...	...	...	...	...
440 miles and over 420	...	345	...	385	340	360	380	...
450 miles and over 420	375	...	391	...	...	...	...	416
460 miles and over 440	...	355	...	395	340	380	390	...
480 miles and over 460	...	360	...	405	340	380	400	...
485 miles and over 450	390	...	...	...	...	...	...	...
500 miles and over 475	...	370	403	415	360	380	410	441
520 miles and over 500	...	...	...	425	360	400	...	...
520 miles and over 485	405	380	...	...	...	...	420	...

Appendix 2—Continued

Distance	Examiner's proposed scale Cents	I.f.a. scale Cents	Carrier's proposed scale Cents	Petersen proposed scale Cents	16 percent of eastern first class Cents	17.5 percent of eastern first class Cents	W.t.l. scale Cents	Seaboard scale Cents
540 miles and over 520	...	...	...	435	380	400	...	...
550 miles and over 500	...	...	416	...	...	...	...	466
560 miles and over 520	420	390	...	445	380	420	430	...
580 miles and over 560	...	...	...	445	380	420	...	...
590 miles and over 560	...	400	...	...	...	...	440	...
600 miles and over 560	435	...	428	465	400	440	...	491
620 miles and over 590	...	410	...	...	400	440	450	...
625 miles and over 600	...	...	...	475	...	...	...	...
640 miles and over 600	...	...	...	...	400	440	...	...
650 miles and over 600	455	415	441	485	...	...	460	517
660 miles and over 640	...	...	...	...	420	460	...	...
675 miles and over 650	...	...	...	495	...	...	...	...
680 miles and over 650	...	425	...	...	420	460	470	...
700 miles and over 650	475	...	454	505	440	480	...	542
710 miles and over 680	...	435	...	...	...	...	480	...
720 miles and over 700	...	...	...	...	440	480	...	...
725 miles and over 700	...	...	...	515	...	...	...	...
740 miles and over 710	...	445	...	...	440	480	490	...
750 miles and over 700	495	...	467	525	...	...	...	567
760 miles and over 740	...	...	...	...	460	500	...	...
770 miles and over 740	...	...	...	...	...	...	500	...
800 miles and over 750	515	...	...	...	460	500	510	...
830 miles and over 800	...	...	...	...	...	...	520	...
850 miles and over 800	535	...	...	...	480	520	...	...
860 miles and over 830	...	...	...	...	...	...	530	...
890 miles and over 860	...	...	...	...	...	...	540	...
900 miles and over 850	555	...	...	...	500	540	...	...
950 miles and over 900	575	...	...	...	...	...	...	...
1,000 miles and over 950	595	...	...	...	...	...	...	...

Appendix 3

Study of progression of various scales prescribed by Interstate Commerce Commission compared with progression of i.f.a. coke scale

Distance	15 percent of present official-territory first-class rate	I.f.a. coke scale	15.5 percent of first class former c.f.a. scale	70 percent of cement scale [1]
	Cents	Cents	Cents	Cents
5 miles	90	90	90	91
10 miles	93	90	96	91
15 miles	99	100	99	91
20 miles	102	100	107	98
25 miles	108	110	113	98
[fol. 92]				
30 miles	111	110	118	105
35 miles	117	120	126	105
40 miles	120	120	129	105
45 miles	126	130	135	112
50 miles	129	130	143	112
55 miles	135	135	146	112
60 miles	138	135	147	119
65 miles	144	145	147	119
70 miles	147	145	152	119
75 miles	153	155	155	126
80 miles	156	155	157	126
85 miles	159	165	161	126
90 miles	162	165	164	133
95 miles	165	165	166	133
100 miles	168	165	167	133
110 miles	174	180	175	147
120 miles	180	180	181	147
130 miles	186	186	186	154
140 miles	192	192	191	154
150 miles	198	198	197	161
160 miles	201	210	203	161
170 miles	207	225	206	168
180 miles	210	225	214	168
190 miles	216	235	220	175
200 miles	219	235	225	175
210 miles	225	245	226	182
220 miles	228	245	231	182
230 miles	234	255	233	189
240 miles	237	255	236	189

[1] Prescribed for application from Hannibal and St. Louis, Mo., and from Buffington, Ind., to points in Illinois, and from Hannibal to points in Indiana in Atlas Portland Cement Co. v. C., B. & Q. R. R. Co., 81 I. C. C. 1, 11.

Appendix 3—Continued

Study of progression of various scales prescribed by Interstate Commerce Commission compared with progression of i.f.a. coke scale

Distance	15 percent of present official-territory first-class rate	I.f.a. coke scale	15.5 percent of first class former c.f.a. scale	70 percent of cement scale [1]
	Cents	Cents	Cents	Cents
250 miles	246	265	240	196
260 miles	246	265	243	196
270 miles	252	270	245	203
280 miles	252	270	245	203
290 miles	261	280	250	210
300 miles	261	280	254	210
310 miles	267	290	259	210
320 miles	267	290	259	217
340 miles	276	300	264	217
360 miles	282	310	270	224
370 miles	288	320	274	224
380 miles	288	320	274	231
400 miles	297	325	282	231
420 miles	303	335	285	238
430 miles	312	345	293	238
440 miles	312	345	293	245
460 miles	318	355	299	245
480 miles	324	360	302	252
490 miles	333	370	312	252
500 miles	333	370	312	259
520 miles	339	380	315	259
530 miles	348	380	321	266
540 miles	348	390	321	266
550 miles	354	390	324	266
560 miles	354	390	324	273
580 miles	360	400	332	273
590 miles	369	400	338	280
600 miles	369	410	338	280
610 miles	375	410	343	280
620 miles	375	410	343	287
640 miles	384	415	350	287
650 miles	390	415	353	294
660 miles	390	425	353	294
670 miles	396	425	360	294
680 miles	396	425	360	301
700 miles	405	435	367	301
720 miles	411	445	371	...
740 miles	417	445	377	...

[1] See footnote on preceeding page.

Appendix 4

Petersen proposed coke scale contrasted with carriers' proposed scale, i.f.a. scale, and Holmes & Hallowell coke scale

(1) Miles	(2) Carriers' prop. coke	(3) Carriers' prop. coke Mills	(4) I.f.a. coke	(5) I.f.a. coke Mills	(6) 85 percent of H. & H. coal scale	(7) 85 percent of H. & H. coal Mills	(8) H. & H. coke scale	(9) Petersen prop. coke	(10) Percent col. 9 of col. 6 Percent	(11) Petersen prop. coke Mills
10	$1.01	101.0	$0.90	90.0	....	....	.....	....	.....	....
20	1.01	50.5	1.00	50.0	....	....	....	....	.....	....
30	1.13	37.7	1.10	36.7	$0.72	24.0	$0.91	$0.90	125	30.0
40	1.26	31.5	1.20	30.0	.80	20.0	1.00	1.00	125	25.0
50	1.39	27.8	1.30	26.0	.87	17.4	1.26	1.10	126.4	22.0
60	1.51	25.2	1.35	22.5	.94	15.7	1.35	1.20	127.7	20.0
70	1.64	23.4	1.45	20.7	1.01	14.4	1.43	1.30	128.7	18.6
80	1.76	22.0	1.55	19.4	1.09	13.6	1.58	1.40	128.4	17.5
90	1.89	21.0	....	18.3	1.16	12.9	1.66	....	.....	....
100	2.02	20.2	1.65	16.5	1.23	12.3	1.75	1.55	126	15.5
110	....	....	....	....	1.30	11.8	1.83	....	.....	....
120	2.14	17.8	1.80	15.0	1.36	11.3	1.91	1.70	125	14.2
130	....	....	....	....	1.43	11.0	1.98	....	.....	....
140	2.27	16.2	1.95	13.9	1.49	10.6	2.05	1.85	124.2	13.2
150	....	....	....	....	1.55	10.3	2.13	....	.....	....
160	2.39	14.9	2.10	13.1	1.62	10.1	2.20	2.00	123.5	12.5
170	....	....	....	....	1.67	9.8	2.27	....	.....	....
180	2.52	14.0	2.25	12.5	1.73	9.6	2.34	2.15	124.3	11.9
190	....	....	....	....	1.79	9.4	2.42	....	.....	....
200	2.65	13.3	2.35	11.8	1.86	9.3	2.49	2.30	123.7	11.5
210	....	....	....	....	1.92	9.1	2.56	....	.....	....

Appendix 4—Continued

Petersen proposed coke scale contrasted with carriers' proposed scale, i.f.a. scale, and Holmes & Hallowell coke scale

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Miles	Carriers' prop. coke	Carriers' prop. coke Mills	I.f.a. coke	I.f.a. coke Mills	85 percent of H. & H. coal scale	85 percent of H. & H. coal Mills	H. & H. coke scale	Petersen prop. coke	Percent col. 9 of col. 6 Percent	Petersen prop. coke Mills
220	....	....	2.45	11.1	1.98	9.0	2.64	2.45	123.7	11.1
225	2.77	12.3	....	....	....	....	....	....	.....	....
230	....	....	....	....	2.05	8.9	2.71	....	....	....
235	....	....	....	....	....	....	....	2.55	.....	10.9
240	....	....	2.55	10.6	2.11	8.8	2.78	....	.....	....
250	2.90	11.6	....	....	2.17	8.7	2.86	2.65	122.1	10.6
260	....	....	2.65	10.2	2.22	8.5	3.04	....	.....	....
265	....	....	....	....	....	....	....	2.75	.....	10.4
270	....	....	....	....	2.27	8.4	3.10	....	.....	....
275	3.02	11.0	....	....	....	....	....	....	.....	....
280	....	....	2.70	9.6	2.32	8.3	3.16	2.85	122.8	10.2
290	....	....	....	....	2.37	8.2	3.22	....	.....	....
295	....	....	....	....	....	....	....	2.95	.....	10.0
300	3.15	10.5	2.80	9.3	2.43	8.1	3.28	....	.....	....
310	....	....	....	....	2.48	8.0	3.34	3.05	123	9.8
320	....	....	2.90	9.1	2.53	7.9	3.40	....	.....	....
325	3.28	10.1	....	....	....	....	....	3.15	.....	9.7
330	....	....	....	....	2.58	7.8	3.47	....	.....	....
340	....	....	3.00	8.8	2.64	7.8	3.52	3.25	123.1	9.6
350	3.40	9.7	....	....	2.69	7.7	3.59	....	.....	....
355	....	....	....	....	....	....	....	3.35	.....	9.4

360	....	....	3.10	8.6	2.74	7.6	3.65	....	.....	....
370	....	....	....	....	2.79	7.5	3.71	3.45	123.7	9.3
375	3.53	9.4	....	....	....	....	....	....	.....	....
380	....	....	3.20	8.4	2.84	7.5	3.77	....	.....	....
385	....	....	....	....	....	....	....	3.55	.....	9.2
390	....	....	....	....	2.89	7.4	3.83	....	.....	....
400	3.65	9.1	3.25	8.1	2.94	7.4	3.89	3.65	124.2	9.1
420	....	....	3.35	8.0	....	....	....	3.75	.....	8.9
425	3.78	8.9	....	....	3.04	7.2	4.01	....	.....	....
440	....	....	3.45	7.8	....	....	....	3.85	.....	8.8
450	3.91	8.7	....	....	3.15	7.0	4.13	....	.....	....
460	....	....	3.55	7.7	....	....	....	3.95	.....	8.6
475	....	....	....	....	3.26	6.9	4.25	....	.....	....
480	....	....	3.60	7.5	....	....	....	4.05	.....	8.4
500	4.03	8.1	3.70	7.4	3.36	6.7	4.44	4.15	123.5	8.3
520	....	....	....	....	....	....	....	4.25	.....	8.2
525	....	....	....	....	3.46	6.6	4.56	....	.....	....
530	....	....	3.80	7.2	....	....	....	....	.....	....
540	....	....	....	....	....	....	....	4.35	.....	8.1
550	4.16	7.6	....	....	3.56	6.5	4.68	....	.....	....
560	....	....	3.90	7.0	....	....	....	4.45	.....	7.9
575	....	....	....	....	3.66	6.4	4.80	....	.....	....
580	....	....	....	....	....	....	....	4.55	.....	7.8
590	....	....	4.00	6.8	....	....	....	....	.....	....
600	4.28	7.1	....	....	3.77	6.3	4.92	4.65	123.3	7.7
620	....	....	4.10	6.6	....	....	....	....	.....	....
625	....	....	....	....	3.88	6.2	5.04	4.75	122.4	7.6

Appendix 4—Continued

Petersen proposed coke scale contrasted with carriers' proposed scale, i.f.a. scale, and Holmes & Hallowell coke scale

[fol. 94] Miles	(1)	(2) Carriers' prop. coke	(3) Carriers' prop. coke Mills	(4) I.f.a. coke	(5) I.f.a. coke Mills	(6) 85 percent of H. & H. coal scale	(7) 85 percent of H. & H. coal Mills	(8) H. & H. coke scale	(9) Petersen prop. coke	(10) Percent col. 9 of col. 6 Percent	(11) Petersen prop. coke Mills
650		4.41	6.8	4.15	6.4	3.98	6.1	5.17	4.85	121.9	7.5
675		....	....	.....	....	....	....	....	4.95	.....	7.3
680		....	....	4.25	6.3	....	....	....	....	.....	....
700		4.54	6.4	....	....	....	....	....	5.05	.....	7.2
710		....	....	4.35	6.1	....	....	....	....	.....	....
725		....	....	....	....	....	....	....	5.15	.....	7.1
740		....	....	4.45	6.0	....	....	....	....	.....	....
750		4.67	6.2	....	....	....	....	....	5.25	.....	7.0
775		....	....	....	....	....	....	....	5.35	.....	6.9
800		....	....	....	....	....	....	....	5.45	.....	6.8
830		....	....	....	....	....	....	....	5.55	.....	6.7
860		....	....	....	....	....	....	....	5.65	.....	6.6
890		....	....	....	....	....	....	....	5.75	.....	6.5
920		....	....	....	....	....	....	....	5.85	.....	6.4
950		....	....	....	....	....	....	....	5.95	.....	6.3

Present rates in cents per 2,000 pounds on coke from Birmingham and Chattanooga to representative destinations in Ohio, Michigan, Indiana, and Illinois compared with like rates from 16 central-territory producing origins to the same destinations; also present or suggested rates under the i.f.a. scale and the carriers' proposed scale for like distances (distances computed under the formula provided in the Indiana Coke case)

From—	To Cincinnati, Ohio				To Toledo, Ohio				To Detroit, Mich.				To Grand Rapids, Mich.			
	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents
Southern origins:																
Birmingham, Ala	481	338	370	403	678	440	425	454	742	465	455	467	764	491	455	479
Chattanooga, Tenn	338	259	300	340	535	328	390	416	599	365	410	428	636	416	415	441
Central origins:																
Chicago	285	290	280	315	234	265	255	290	269	252	270	302	184	239	235	265
Detroit	261	277	270	302	59	123	135	151	...	...	...	...	152	200	210	239
Indianapolis	110	177	180	214	210	252	245	277	265	245	265	302	252	245	265	302
Terre Haute	182	239	235	265	282	290	280	315	323	300	300	328	293	270	280	315
Fort Wayne	157	...	210	239	94	166	165	202	146	180	210	239	142	214	210	239
Granite City	341	340	310	340	428	391	345	391	469	360	360	403	431	360	345	391
Hamilton	25	101	110	113	176	239	225	252	235	265	255	290	278	277	270	315
Portsmouth	107	177	180	214	224	277	255	277	283	302	280	315	379	378	320	365
Ashland	146	189	210	239	247	246	265	290	306	302	290	328	406	378	335	378
Ironton	134	189	195	227	251	246	265	302	310	269	290	328	406	378	335	378
Cleveland	240	265	255	290	107	189	180	214	166	227	225	252	272	290	270	302
Massillon	237	265	255	290	130	214	195	227	189	252	235	265	295	290	280	315
Canton	246	265	265	290	139	214	195	227	198	227	235	265	304	290	290	328
Youngstown	296	290	280	315	173	239	225	252	232	265	255	290	338	290	300	340
Painesville	269	290	270	302	135	189	195	227	195	252	235	265	300	290	280	315
Toledo	202	252	245	277	...	...	...	...	59	123	135	151	165	180	225	252

[fol. 96] Appendix 5—Continued

Present rates in cents per 2,000 pounds on coke from Birmingham and Chattanooga to representative destinations in Ohio, Michigan, Indiana, and Illinois compared with like rates from 16 central-territory producing origins to the same destinations; also present or suggested rates under the i.f.a. scale and the carriers' proposed scale for like distances (distances computed under the formula provided in the Indiana Coke case)

From—	To Indianapolis, Ind.				To South Bend, Ind.				To Chicago, Ill.				To Peoria, Ill.			
	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents	Miles	Present rate Cents	I.f.a. scale Cents	Carriers' proposed scale Cents
Southern origins:																
Birmingham	504	430	380	416	656	465	425	454	649	430	415	441	609	462	410	442
Chattanooga	424	391	345	378	576	416	400	428	593	416	410	428	554	430	390	481
Central origins:																
Chicago	184	239	235	265	85	176	165	189	...	...	...	...	155	210	210	239
Detroit	265	277	270	302	181	214	235	265	269	265	270	302	379	365	320	365
Indianapolis	...	...	...	...	141	200	210	239	184	235	235	265	207	245	245	277
Terre Haute	72	151	155	176	182	215	235	265	178	225	225	252	171	225	225	252
Fort Wayne	119	202	180	214	87	158	165	189	148	214	210	239	244	272	265	290
Granite City	243	265	265	290	328	300	300	340	275	235	270	302	142	210	210	239
Hamilton	99	189	165	202	218	252	245	277	265	277	270	302	306	302	290	328
Portsmouth	217	277	245	277	345	365	310	340	392	391	325	365	424	403	345	378
Ashland	256	277	265	302	375	365	320	353	431	391	345	391	463	403	360	403
Ironton	244	277	265	290	372	365	320	353	419	391	335	378	451	403	355	403
Cleveland	280	290	270	315	255	290	265	302	339	290	300	340	432	353	345	391
Massillon	284	290	280	315	277	290	270	315	347	290	310	340	457	353	355	403
Canton	293	290	280	315	287	290	280	315	354	290	310	353	466	353	360	403
Youngstown	340	290	300	340	321	290	300	328	406	290	335	378	505	353	380	416
Painesville	309	290	290	328	284	290	280	315	368	290	320	353	461	353	360	403
Toledo	210	252	245	277	148	194	210	239	234	265	255	290	338	340	300	340

Appendix 6

From—	To Kansas City, Mo.			To Omaha, Nebr.			To St. Paul, Minn.			To Iowa City, Iowa			To Fort Dodge, Iowa			To Milwaukee, Wis.		
	Miles	Present rate Cents	W.t.l. scale Cents	Miles	Present rate Cents	W.t.l. scale Cents	Miles	Present rate Cents	W.t.l. scale Cents	Miles	Present rate Cents	W.t.l. scale Cents	Miles	Present rate Cents	W.t.l. scale Cents	Miles	Present rate Cents	W.t.l. scale Cents
Chicago	437	380	...	487	400	...	396	360	...	217	270	...	364	350	...	85	165	...
Milwaukee	512	420	...	507	410	...	320	320	...	241	290	...	369	350	...	...	...	...
St. Louis	278	300	...	413	370	...	540	430	...	285	310	...	414	370	...	364	310	...
Terre Haute	432	380	...	560	430	...	574	440	...	317	320	...	493	410	...	263	270	...
Indianapolis	493	410	...	595	450	...	580	440	...	347	340	...	520	420	...	269	270	...
Ashland	758	568	500	858	728	530	825	707	520	612	670	450	799	755	510	511	556	380
Ironton	755	568	500	846	728	530	815	707	520	602	670	450	792	755	510	504	556	380
New Boston	731	568	490	830	728	520	791	707	510	586	670	440	768	755	500	480	556	370
Average	748	...	500	845	...	530	810	...	520	600	...	450	786	...	510	498	...	370

From—	To La Crosse, Wis.			To Sheboygan, Wis.			To Watertown, S.Dak.			To Davenport, Iowa			To St. Louis, Mo.		
	Miles	Present rates Cents	W.t.l. scale Cents	Miles	Present rates Cents	W.t.l. scale Cents	Miles	Present rates Cents	W.t.l. scale Cents	Miles	Present rates Cents	W.t.l. scale Cents	Miles	Present rates Cents	W.t.l. scale Cents
Chicago	263	300	...	137	215	...	587	465	...	164	225	...	279	270	...
Milwaukee	196	260	...	52	150	...	526	445	...	200	235	...	...	310	...
St. Louis	436	380	...	415	370	...	649	500	...	240	255	...	...	...	...
Terre Haute	441	380	...	315	320	...	733	515	...	266	270	...	166	225	...
Indianapolis	447	390	...	321	330	...	760	525	...	292	280	...	238	265	...
Ashland	689	691	480	563	606	440	1,016	780	615	558	616	390	485	403	370
Ironton	682	691	480	556	606	430	1,011	780	615	547	616	390	477	403	360
New Boston	658	691	470	532	606	430	987	780	605	531	616	390	452	403	355
Average	676	...	470	550	...	430	1,001	...	605	545	...	390	471	...	360

[fol. 98] Appendix 7

Comparison of bituminous-coal rates from southern Ohio groups with coke rates if the i.f.a. and w.t.l. scales were extended to apply from Ashland, Portsmouth, and Ironton

(1) To—	(2) Average distance [1]	(3) Rate under i.f.a. scale (per ton) [2]	(4) Rate under w.t.l. scale (per ton) [3]	(5) Rate on bituminous coal (per ton) [4]	(6) Excess of coke rate [5]
	Miles				Cents
Chicago, Ill.	419	$3.25	....	$2.74	61
Rockford, Ill.	504	3.80	....	3.67	13
Burlington, Iowa	551	3.90	....	3.80	10
Clinton, Iowa	557	3.90	....	3.95	[6] 5
Rock Island, Ill.	563	4.00	....	3.80	20
Keokuk, Iowa	645	4.15	....	3.80	35
Cedar Rapids, Iowa	638	....	$4.60	4.35	25
Des Moines, Iowa	717	....	4.90	4.55	35
Kansas City, Mo.	748	....	5.00	5.18	[6] 18
St. Joseph, Mo.	802	....	5.20	5.18	2
Omaha, Nebr.	846	....	5.30	5.18	12
Sioux City, Iowa	929	....	5.60	5.65	[6] 5
Madison, Wis.	549	3.90	....	4.32	[6] 42
LaCrosse, Wis.	682	....	4.80	4.85	[6] 5
Detroit, Mich.	295	2.80	....	2.10	70
Fort Wayne, Ind.	258	2.65	....	2.20	45
Grand Rapids, Mich.	398	3.25	....	2.75	50
South Bend, Ind.	336	3.00	....	2.54	46
Toledo, Ohio	241	2.65	....	1.89	76

[1] Average distance from Ashland, Portsmouth, and Ironton.

[2] Rate under i.f.a. scale from Ashland, Portsmouth, and Ironton for average distance shown in column 2.

[3] Rate under w.t.l. scale from Ashland, Portsmouth, and Ironton for average distance shown in column 2.

[4] Rate on bituminous coal from Ohio coal groups.

[5] Excess that coke rates from Ashland, Portsmouth, and Ironton under i.f.a. scale are over Ohio group coal rates shown in column 5.

[6] Excess that Ohio group coal rates are over coke rates from Ashland, Portsmouth, and Ironton under Illinois or western trunk line coke scale.

Appendix 8

Basic scales of maximum reasonable rates and arbitraries prescribed (rates are in cents per 2,000 pounds)

(1) Distance	(2) Scale for application in central and Illinois territories [1]	(3) Scale for application to zone 1 and extended zone C in western trunk-line territory, and from south to central and Illinois territories [2]	(4) Arbitraries for application west and south of zone 1, western trunk-line territory
	Cents	Cents	Cents
10 miles and under	90	100	15
20 miles and over 10	100	110	15
30 miles and over 20	110	120	20
40 miles and over 30	120	130	20
50 miles and over 40	130	140	20
60 miles and over 50	140	150	25
70 miles and over 60	150	160	25

[1] Destinations in zone C, Michigan excepted.

[2] Destinations in zone C, Michigan included.

Appendix 8—Continued

Basic scales of maximum reasonable rates and arbitraries prescribed (rates are in cents per 2,000 pounds)

(1) Distance	(2) Scale for application in central and Illinois territories [1]	(3) Scale for application to zone 1 and extended zone C in western trunk-line territory, and from south to central and Illinois territories [1]	(4) Arbitraries for application west and south of zone 1, western trunk-line territory
	Cents	Cents	Cents
80 miles and over 70	160	170	25
100 miles and over 80	175	185	30
120 miles and over 100	190	200	30
140 miles and over 120	205	215	30
[fol. 99]			
160 miles and over 140	215	230	35
180 miles and over 160	225	245	35
200 miles and over 180	235	260	40
220 miles and over 200	245	270	40
240 miles and over 220	255	280	40
260 miles and over 240	265	290	45
280 miles and over 260	275	305	45
300 miles and over 280	285	315	45
320 miles and over 300	295	325	50
340 miles and over 320	305	335	50
360 miles and over 340	315	345	50
380 miles and over 360	325	360	55
400 miles and over 380	335	370	55
425 miles and over 400	345	380	55
450 miles and over 425	355	390	60
475 miles and over 450	365	400	60
500 miles and over 475	375	415	60
530 miles and over 500	385	425	...
560 miles and over 530	395	435	...
590 miles and over 560	405	445	...
620 miles and over 590	415	455	...
650 miles and over 620	425	470	...
680 miles and over 650	435	480	...
710 miles and over 680	445	490	...
740 miles and over 710	455	500	...
770 miles and over 740	465	510	...
800 miles and over 770	475	520	...
830 miles and over 800	...	530	...
860 miles and over 830	...	540	...
890 miles and over 860	...	550	...
920 miles and over 890	...	560	...
950 miles and over 920	...	570	...
980 miles and over 950	...	580	...
1,010 miles and over 980	...	590	...
1,060 miles and over 1,010	...	605	...
1,100 miles and over 1,060	...	615	...
1,140 miles and over 1,100	...	625	...
1,180 miles and over 1,140	...	635	...
1,220 miles and over 1,180	...	645	...
1,260 miles and over 1,220	...	655	...
1,300 miles and over 1,260	...	665	...
1,340 miles and over 1,300	...	675	...
1,380 miles and over 1,340	...	685	...
1,420 miles and over 1,380	...	695	...
1,460 miles and over 1,420	...	705	...
1,500 miles and over 1,460	...	715	...

See footnote on page 106.

[fol. 100] Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 30th day of June, A. D. 1933.

Investigation and Suspension Docket No. 3511

Coke Between Points in Central and Illinois Territories

It appearing, That by orders dated September 13, September 20, October 4, and October 9, 1930, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules until April 15, April 22, May 9, and May 15, 1931, respectively;

It further appearing, That the operation of said schedules has been voluntarily deferred by respondents until September 15, 1933;

And it further appearing, That a full investigation of the matters and things involved has been had, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules, on or before September 15, 1933, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that this proceeding be discontinued.

No. 23375

CITIZENS GAS COMPANY OF INDIANAPOLIS; HAMILTON COKE and Iron Company; Indiana Consumers Gas and By-Products Company; Inland Steel Company; Interlake Iron Corporation; Milwaukee Coke and Gas Company; Pittsburgh Crucible Steel Company; The Portsmouth By-Product Coke Company; Wheeling Steel Corporation; and The Youngstown Sheet and Tube Company.

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY; The Akron & Barberton Belt Railroad Company; The [fol. 101] Alabama Great Southern Railroad Company;

Aliquippa and Southern Railroad Company; Alton & Eastern Railroad Company; Alton and Southern Railroad; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; Beaver Valley Railroad Company; Belt Railway Company of Chattanooga; The Belt Railway Company of Chicago; Bessemer and Lake Erie Railway Company; Birmingham Belt Railroad Company; Birmingham Southern Railroad Company; Boyne City, Gaylord and Alpena Railroad Company; Buffalo, Rochester and Pittsburgh Railway Company; Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessee); Central Indiana Railway Company; Central of Georgia Railway Company; The Chesapeake and Ohio Railway Company; The Chicago and Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers; Chicago and Calumet River Railroad Company; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Chicago and North Western Railway Company; Chicago and Western Indiana Railroad Company; Chicago and Illinois Valley Railroad Company; Chicago, Attica & Southern Railroad Company; Chicago, Aurora and Elgin Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company, Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Kalamazoo and Saginaw Railway Company (The New York Central Railroad Company, Lessee); Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, North Shore and Milwaukee Railroad Company; The Chicago River and Indiana Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Chicago Short Line Railway Company; Chicago, Springfield & St. Louis Railway Company and Elmer Nafziger, Receiver; Chicago, South Shore and South Bend Railroad; Chicago, West Pullman & Southern Railroad Company; Cincinnati & Lake Erie Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Cin-

cinnati Northern Railroad Company (The New York Central Railroad Company, Lessee); Cincinnati Saginaw and Mackinaw Railroad Company (Grand Trunk Western Railroad Company, Lessee); The Cleveland, Cincin- [fol. 102] nati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); The Cleveland, Painesville and Ashtabula Railroad Company; Coudersport and Port Allegany Railroad Company; Dayton and Union Railroad Company; The Dayton-Xenia Railway Company; Delray Connecting Railroad Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Caro and Sandusky Railway Company; Detroit, Jackson & Chicago Railway and John F. Collins, Receiver; Detroit Terminal Railroad Company; Detroit, Toledo and Ironton Railroad Company; Donora Southern Railroad Company; East Jordan & Southern Railroad Company; East St. Louis Connecting Railway Company; East St. Louis Junction Railroad; Eastern Michigan Railways; Eastern Michigan Toledo Railroad; Elgin, Joliet and Eastern Railway Company; Erie & Michigan Railway & Navigation Co.; Erie Railroad Company; Etna and Montrose Railroad Company; Evansville & Ohio Valley Railway Company and Wm. A. Carson, Receiver; Evansville, Suburban & Newburgh Railway Company; The Fairport, Painesville and Eastern Railroad Company; The Federal Valley Railroad Company; The Felicity and Bethel Railroad Company; Ferdinand Railroad Company; The Findlay Belt Railway Company; Flemingsburg and Northern Railroad Company; Fort Wayne-Lima Railroad Company; Fort Wayne Union Railway Company; Frankfort and Cincinnati Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Northern Railroad Company; The Hamilton Belt Railway Company; The Hocking Valley Railway Company; Illinois Central Railroad Company; The Ann Arbor Railroad Company; Illinois Northern Railway; St. Louis and Illinois Belt Railway (Illinois Terminal Company, Lessee); Indiana Harbor Belt Railroad Company; Indiana Northern Railway Company; The Indianapolis Union Railway Company; Interstate Railroad Company; Jacksonville & Havana Railroad Company and Elmer Nafziger, Receiver; Kentucky & Indiana Terminal Railroad Company; The Lake Erie and Eastern Railroad

Company; The Lake Shore Electric Railway Company; The Lake Terminal Railroad Company; The LaSalle and Bureau County Railroad Company; The Lima & Defiance Railroad Company; Litchfield and Madison Railway Company; The Lorain and Southern Railroad Company; The Lorain & West Virginia Railway Company; Louisville & Jeffersonville Bridge and Railroad Company; Louisville and Nashville Railroad Company; Louisville, New Albany & Corydon Railroad Company; Ludington [fol. 103] & Northern Railway; Manistee and Northeastern Railway Company; Manufacturers' Junction Railway Company; Manufacturers Railway Company (St. Louis); The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri and Illinois Bridge and Belt Railroad Company; Missouri-Illinois Railroad Company; Missouri Pacific Railroad Company; Mobile and Ohio Railroad Company; The Monongahela Connecting Railroad Company; The Monongahela Railway Company; Montour Railroad Company; Muncie and Western Railroad Company; Muskegon Railway and Navigation Company; The Nashville, Chattanooga & St. Louis Railway; The Newburgh and South Shore Railway Company; New Jersey, Indiana & Illinois Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; Northern Indiana Railway, Inc.; The Northern Ohio Railway Company; Norton and Northern Railway; The Ohio Public Service Company; The Ohio River and Western Railway Company; Paducah & Illinois Railroad Company; The Pennsylvania Railroad Company; The Pennsylvania-Ohio Power and Light Company; Peoria and Pekin Union Railway Company; Peoria Terminal Company; Pere Marquette Railway Company; Pittsburgh, Allegheny & McKees Rocks Railroad Company; The Pittsburgh and Lake Erie Railroad Company; Pittsburgh and Ohio Valley Railway Company; The Pittsburgh & West Virginia Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Lisbon & Western Railroad Company; Port Huron and Detroit Railroad Company; The Rapid Railway Company and Detroit and Security Trust Company, Receiver;

The City Electric Railway Company of Port Huron and Detroit and Security Trust Company, Receiver; Detroit, Mt. Clemens & Marine City Railway and Detroit and Security Trust Company, Receiver; The Port Huron, St. Clair & Marine City Railway Company and Detroit and Security Trust Company, Receiver; The River Terminal Railway Company; Rock Island Southern Railway Co.; Rutland, Tolnca and Northern Railroad Company; St. Louis and Hannibal Railroad Company; The St. Louis and O'Fallon Railway Company; St. Louis Merchants Bridge Terminal Railway Company; St. Louis-San Francisco Railway Company; The St. Louis Transfer Railway Company; The Sharpsville Railroad Company and G. M. [fol. 104] McIlvain, Receiver; Southern Railway Company; Tennessee, Alabama and Georgia Railway; Tennessee Central Railway Company; Terminal Railroad Association of St. Louis; The Toledo & Indiana Railroad Company; Toledo and Western Railway Company; The Toledo, Angola & Western Railway Company; The Toledo, Bowling Green and Southern Traction Company; Toledo Peoria & Western Railroad; The Toledo Terminal Railroad Company; Union Railroad Company (Pittsburgh, Pa.); Wabash Railway Company; Western Allegheny Railroad Company; The Westfield Railroad Company; The Wheeling and Lake Erie Railway Company; The Wiggins Ferry Company; The Winfield Railroad Company; The Winona Railroad Co.; Wyandotte Terminal Railroad Company; The Youngstown and Northern Railroad Company; The Youngstown & Ohio River Railroad Company; Delray Terminal Railroad Company; and the Youngstown & Suburban Railway Company.

No. 23375 (Sub-No. 1)

DIAMOND ALKALI COMPANY

vs.

THE AKRON & BARBERTON BELT RAILROAD COMPANY; THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY; The Alabama Great Southern Railroad Company; Aliquippa and Southern Railroad Company; Alton & Eastern Railroad Company; Alton and Southern Railroad; The Ann Arbor Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio

Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; Beaver Valley Railroad Company; Belt Railway Company of Chattanooga; The Belt Railway Company of Chicago; Bessemer and Lake Erie Railroad Company; Birmingham Belt Railroad Company; Birmingham Southern Railroad Company; Boyne City, Gaylord and Alpena Railroad Company; Buffalo, Rochester and Pittsburgh Railway Company; Carolina, Clinchfield and Ohio Railway (Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, Lessees); Central Indiana Railway Company; Central of Georgia Railway Company; The Chesapeake and Ohio Railway Company; The Chicago and Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers; Chicago and Calumet River Railroad Company; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; [fol. 105] Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Chicago and North Western Railway Company; Chicago and Western Indiana Railroad Company; Chicago and Illinois Valley Railroad Company; Chicago, Attica & Southern Railroad Company; Chicago, Aurora and Elgin Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Kalamazoo and Saginaw Railway Company (The New York Central Railroad Company, Lessee); Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, North Shore and Milwaukee Railroad Company; The Chicago River and Indiana Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Chicago Short Line Railway Company; Chicago, Springfield & St. Louis Railway Company and Elmer Nafziger, Receiver; Chicago, South Shore and South Bend Railroad; Chicago, West Pullman & Southern Railroad Company; Cincinnati & Lake Erie Railroad Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Cincinnati Northern Railroad Company (The New

York Central Railroad Company, Lessee); The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); The Cleveland, Painesville and Ashtabula Railroad Company; Coudersport and Port Allegany Railroad Company; Dayton and Union Railroad Company; The Dayton-Xenia Railway Company; Delray Connecting Railroad Company; Delray Terminal Railroad Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Caro and Sandusky Railway Company; Detroit, Jackson & Chicago Railway and John F. Collins, Receiver; Detroit Terminal Railroad Company; Detroit, Toledo and Ironton Railroad Company; Donora Southern Railroad Company; East Jordan & Southern Railroad Company; East St. Louis Connecting Railway Company; East St. Louis Junction Railroad; Eastern Michigan Railways; Eastern Michigan Toledo Railroad; Elgin, Joliet and Eastern Railway Company; Erie & Michigan Railway & Navigation Co.; Erie Railroad Company; Etna and Montrose Railroad Company; Evansville & Ohio Valley Railway Company and Wm. A. Carson, Receiver; Evansville, Suburban & Newburgh Railway Company; The Fairport, [fol. 106] Painesville and Eastern Railroad Company; The Federal Valley Railroad Company; The Felicity and Bethel Railroad Company; Ferdinand Railroad Company; The Findlay Belt Railway Company; Flemingsburg and Northern Railroad Company; Fort Wayne-Lima Railroad Company; Fort Wayne Union Railway Company; Frankfort and Cincinnati Railroad Company; Canadian National Railway Company; The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee); The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); Cincinnati, Saginaw and Mackinaw Railroad Company (Grand Trunk Western Railroad Company, Lessee); Grand Trunk Western Railroad Company; Gulf Mobile and Northern Railroad Company; The Hamilton Belt Railway Company; The Hocking Valley Railway Company; Illinois Central Railroad Company; Illinois Northern Railway; Illinois Terminal Company; Indiana Harbor Belt Railroad Company; Indiana Northern Railway Company; The Indianapolis Union Railway Company; Interstate Railroad Company; Jack-

sonville & Havana Railroad Company and Elmer Nafziger, Receiver; Kentucky & Indiana Terminal Railroad Company; Lake Erie and Eastern Railroad Company; The Lake Shore Electric Railway Company; The Lake Terminal Railroad Company; The LaSalle and Bureau County Railroad Company; The Lima & Defiance Railroad Company; Litchfield and Madison Railway Company; The Lorain and Southern Railroad Company; The Lorain & West Virginia Railway Company; Louisville & Jeffersonville Bridge and Railroad Company; Louisville and Nashville Railroad Company; Louisville, New Albany & Corydon Railroad Company; Ludington & Northern Railway; Manistee and Northeastern Railway Company; Manufacturers' Junction Railway Company; Manufacturers' Railway Company (St. Louis); The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri and Illinois Bridge and Belt Railroad Company; Missouri-Illinois Railroad Company; Missouri Pacific Railroad Company; Mobile and Ohio Railroad Company; The Monongahela Connecting Railroad Company; The Monongahela Railway Company; Montour Railroad Company; Muncie and Western Railroad Company; Muskegon Railway and Navigation Company; The Nashville, Chattanooga & St. Louis Railway; The Newburgh and [fol. 107] South Shore Railway Company; New Jersey, Indiana & Illinois Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; Northern Indiana Railway, Inc.; The Northern Ohio Railway Company; Norton and Northern Railway; The Ohio Public Service Company; The Ohio River and Western Railway Company; Paducah & Illinois Railroad Company; The Pennsylvania-Ohio Power and Light Company; The Pennsylvania Railroad Company; Peoria and Pekin Union Railway Company; Peoria Terminal Company; Pere Marquette Railway Company; Pittsburgh, Allegheny & McKees Rocks Railroad Company; The Pittsburgh and Lake Erie Railroad Company; Pittsburgh and Ohio Valley Railway Company; The Pittsburgh & West Virginia Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Com-

pany; The Pittsburgh, Lisbon & Western Railroad Company; Port Huron and Detroit Railroad Company; The Rapid Railway Company and Detroit and Security Trust Company, Receiver; The City Electric Railway Company of Port Huron and Detroit and Security Trust Company, Receiver; Detroit, Mt. Clemens & Marine City Railway and Detroit and Security Trust Company, Receiver; The Port Huron, St. Clair & Marine City Railway Company and Detroit and Security Trust Company, Receiver; The River Terminal Railway Company; Rock Island Southern Railway Company; Rutland, Toluca and Northern Railroad Company; St. Louis and Hannibal Railroad Company; The St. Louis and O'Fallon Railway Company; St. Louis Merchants Bridge Terminal Railway Company; St. Louis-San Francisco Railway Company; The St. Louis Transfer Railway Company; The Sharpsville Railroad Company and G. M. McIlvain, Receiver; Southern Railway Company; Tennessee, Alabama and Georgia Railway; Tennessee Central Railway Company; Terminal Railroad Association of St. Louis; The Toledo & Indiana Railroad Company; Toledo and Western Railway Company; The Toledo, Angola & Western Railway Company; The Toledo, Bowling Green and Southern Traction Company; Toledo, Peoria & Western Railroad; The Toledo Terminal Railroad Company; Wabash Railway Company; Union Railroad Company (Pittsburgh, Pa.); Western Allegheny Railroad Company; The Westfield Railroad Company; The Wheeling and Lake Erie Railway Company; The Wiggins Ferry Company; The Winfield Railroad Company; The Winona Railroad Company; Wyandotte Terminal Railroad Company; The [fol. 108] Youngstown and Northern Railroad Company; The Youngstown & Ohio River Railroad Company; and The Youngstown & Suburban Railway Company.

No. 23173

ASHLAND BY-PRODUCT COKE COMPANY; THE IRONTON BY-PRODUCT COKE COMPANY, and SEMET-SOLVAY COMPANY

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Alton & Eastern Railroad Company; The Baltimore and Ohio Railroad Company; The Belt Railway Company

of Chicago; The Chesapeake and Ohio Railway Company; The Chicago and Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago & Illinois Midland Railway Company; Chicago and Illinois Valley Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Milwaukee and Gary Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Chicago, Springfield & St. Louis Railway Company and Elmer Nafziger, Receiver; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The new York Central Railroad Company, Lessee); The Colorado and Southern Railway Company; The Denver and Rio Grande Western Railroad Company; Detroit, Toledo and Ironton Railroad Company; Elgin, Joliet and Eastern Railway Company; Erie Railroad Company; Fort Dodge, Des Moines & Southern Railroad Company; Great Northern Railway Company; Green Bay and Western Railroad Company; Illinois Central Railroad Company; Illinois Terminal Company; Indiana Harbor Belt Railroad Company; The Kansas City Southern Railway Company; Litchfield and Madison Railway Company; Louisville and Nashville Railroad Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri-Illinois Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pa-
[fol. 109] cific Railroad Company; Mobile and Ohio Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; Oregon Short Line Railroad Company; The Pennsylvania Railroad Company; Peoria and Pekin Union Railway Company; Pere Marquette Railway Company; Quincy, Omaha & Kansas City Railroad Company; Rock Island

Southern Railway Company; The St. Joseph and Grand Island Railway Company; The St. Louis and O'Fallon Railway Company; St. Louis and Ohio River Railroad; St. Louis-San Francisco Railway Company; Southern Railway Company; Toledo, Peoria & Western Railroad; Union Pacific Railroad Company; and Wabash Railway Company.

No. 23173 (Sub-No.1)

THE PORTSMOUTH BY-PRODUCT COKE COMPANY

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; Alton & Eastern Railroad Company; The Baltimore and Ohio Railroad Company; The Belt Railway Company of Chicago; The Chicago and Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago & Illinois Midland Railway Company; Chicago and Illinois Valley Railroad Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Junction Railway (The Chicago River and Indiana Railroad Company, Lessee); Chicago, Milwaukee and Gary Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Chicago, Saint Paul, Minneapolis and Omaha Railway Company; Chicago, Springfield & St. Louis Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); The Colorado and Southern Railway Company; The Denver and Rio Grande Western Railroad Company; Elgin, Joliet and Eastern Railway Company; Erie Railroad Company; Fort Dodge, Des Moines & Southern Railroad Company; Great Northern Railway Company; Green Bay and Western Railroad Company; Illinois Central Railroad Company; Illinois Terminal [Vol. 110] Company; Indiana Harbor Belt Railroad Company; The Kansas City Southern Railway Company; Litchfield and Madison Railway Company; Louisville and Nashville Railroad Company; The Michigan Central

Railroad Company (The New York Central Railroad Company, Lessee); The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri-Illinois Railroad Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company; Mobile and Ohio Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; Oregon Short Line Railroad Company; The Pennsylvania Railroad Company; Peoria and Pekin Union Railway Company; Pere Marquette Railway Company; Quincy, Omaha & Kansas City Railroad Company; Rock Island Southern Railway Company; St. Joseph and Grand Island Railway Company; The St. Louis and O'Fallon Railway Company; St. Louis and Ohio River Railroad; St. Louis-San Francisco Railway Company; Southern Railway Company; Toledo, Peoria & Western Railroad; Union Pacific Railroad Company; and Wabash Railway Company

No. 22052

ALABAMA BY-PRODUCTS CORPORATION; GULF STATES STEEL COMPANY; CENTRAL IRON & COAL COMPANY, and WOODWARD IRON COMPANY

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY; THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY; Alabama Great Southern Railroad Company; Alton & Eastern Railroad Company; Alton and Southern Railroad; The Ann Arbor Railroad Company; Arcadia & Betsey River Railway Company; Arnold Transit Company; The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; The Bay Terminal Railroad Company; The Belt Railway Company of Chicago; Bessemer and Lake Erie Railroad Company; Boyne City, Gaylord and Alpena Railroad Company; Central Indiana Railway Company; The Chesapeake and Ohio Railway Company; The Chicago and Alton Railroad Company and William W. Wheelock and William G. Biard, Receivers; Chicago and Calumet River

Railroad Company; Chicago and Eastern Illinois Rail-
[fol. 111] way Company; Chicago and Erie Railroad Company; Chicago & Illinois Midland Railway Company; Chicago & Illinois Western Railroad; Chicago and North Western Railway Company; Chicago, Attica & Southern Railroad Company; Chicago, Aurora and Elgin Railroad Company; Chicago, Benton Harbor & South Haven Transit Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Harvard & Geneva Lake Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Kalamazoo and Saginaw Railway Company; Chicago, Milwaukee and Gary Railway Company; The Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago, North Shore and Milwaukee Railroad Company; The Chicago, Rock Island and Pacific Railway Company; Chicago Short Line Railway Company; Chicago, South Bend and Northern Indiana Railway Company and R. R. Smith, Receiver; Chicago, South Shore and South Bend Railroad; Chicago, Springfield & St. Louis Railway Company; Chicago, West Pullman & Southern Railroad Company; Cincinnati, Hamilton & Dayton Railway Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Cincinnati Northern Railroad Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Cuyahoga Valley Railway Company; The Dayton and Troy Electric Railway Company; Dayton and Union Railroad Company; The Dayton & Western Traction Company; The Detroit and Huron Railway Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Caro and Sandusky Railway Company; Detroit, Jackson & Chicago Railway and John F. Collins, Receiver; Detroit, Toledo and Ironton Railroad Company; The East End Traction Company; Eastern Michigan Railways; Eastern Michigan Toledo Railroad; East Jordan & Southern Railroad Company; East St. Louis & Suburban Railway Company; East St. Louis, Columbia and Waterloo Railway; East St. Louis Connecting Railway Company; East St. Louis Junction Railroad; Elgin, Joliet and Eastern Railway Company; Erie Railroad Company; Evansville & Ohio Valley Railway Company and William A. Carson, Receiver; Evansville, Indianapolis & Terre Haute Railway Company; Evansville,

Suburban & Newburgh Railway Company; The Fairport, Painesville and Eastern Railroad Company; The Federal Valley Railroad Company; The Felicity and Bethel Railroad Company; Ferdinand Railroad Company; Fort Wayne-Lima Railroad Company; The Fostoria & Fre-
[fol. 112] mont Railway Company; Canadian National Railway Company; The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee); The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee); Cincinnati, Saginaw and Mackinaw Rail Road Company (Canadian National Railway Company, Lessee); Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk-Milwaukee Car Ferry Company; The Michigan Ail Line Railway; Toledo, Saginaw and Muskegon Railway Company; The Hocking Valley Railway Company; Hooppoole, Yorktown and Tampico Railroad Company; Illinois Central Railroad Company; Illinois Northern Railway; Illinois Terminal Company; The Indiana, Columbus and Eastern Traction Company and J. H. McClure, Receiver; Indiana Harbor Belt Railroad Company; Indianapolis and Southeastern Railroad Company; Indiana Service Corporation; Interstate Public Service Company; Jacksonville & Havana Railroad Company; Kewanee & Galva Railway Company; The Lake Shore Electric Railway Company; The Lakeside and Marblehead Railroad Company; The Lake Terminal Railroad Company; The LaSalle and Bureau County Railroad Company; The Lima & Defiance Railroad Company; The Lima Toledo Railroad Company; Litchfield and Madison Railway Company; The Lorain & West Virginia Railway Company; Louisville, Henderson & St. Louis Railway Company; Louisville, New Albany & Corydon Railroad Company; Macomb, Industry & Littleton Railway Company; Manistee and Northeastern Railway Company; Manistique and Lake Superior Railroad Company; Manufacturers Junction Railway Company; The Michigan Central Railroad Company; Michigan Electric Railway Company and John F. Collins, Receiver; Michigan Railroad Company and John F. Collins, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Rail-

way Company; Missouri and Illinois Bridge and Belt Railroad Company; Missouri-Illinois Railroad Company; Missouri Pacific Railroad Company; Mobile and Ohio Railroad Company; The Nashville, Chattanooga & St. Louis Railway; The Newburgh and South Shore Railway Company; The New Castle and Lowell Railway Company; New Jersey, Indiana & Illinois Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; Northern Ala- [fol. 113] bama Railway Company; Northern Ohio Power and Light Company; The Northern Ohio Railway Company; The Ohio Public Service Company; The Ohio River and Western Railway Company; Paducah & Illinois Railroad Company; The Pennsylvania-Ohio Power and Light Company; The Pennsylvania Railroad Company; Peoria and Pekin Union Railway Company; Peoria, Hanna City & Western Railway Co.; Peoria Terminal Company; Pere Marquette Railway Company; The Pittsburgh, Lisbon & Western Railroad Company; The Pontiac, Oxford and Northern Railroad Company; Port Huron and Detroit Railroad Company; Quincy, Omaha & Kansas City Railroad Company; The Rapid Railway Company and Security Trust Company, Receiver; The Rapid Railroad Company and Security Trust Company, Receiver; The Port Huron, St. Clair & Marine City Railway Company and Security Trust Company, Receiver; The City Electric Railway Company of Port Huron and Security Trust Company, Receiver; Detroit, Mt. Clemens & Marine City Railway and Security Trust Company, Receiver; Rutland, Toluca and Northern Railroad Company; St. Louis & Belleville Electric Railway Company; St. Louis and Hannibal Railroad Company; The St. Louis and O'Fallon Railway Company; St. Louis and Ohio River Railroad; St. Louis Belt and Terminal Railway Company; St. Louis Merchants Bridge Terminal Railway Company; St. Louis-San Francisco Railway Company; The St. Louis Transfer Railway Company; Southern Illinois Railway and Power Company; Southern Michigan Railway Company and R. R. Smith and L. V. Bower, Receivers; Tennessee, Alabama & Georgia Railway; Terminal Railroad Association of St. Louis; Terre Haute, Indianapolis and Eastern Traction Company; The Toledo

& Indiana Railroad Company; Toledo and Western Railway Company; The Toledo, Angola & Western Railway Company; The Toledo, Bowling Green and Southern Traction Company; The Toledo, Fostoria & Findlay Railway Company; Toledo, Peoria & Western Railroad; The Toledo Terminal Railroad Company; Union Traction Company of Indiana and Arthur W. Brady, Receiver; Wabash Railway Company; The West End Traction Company; Western Ohio Railway & Power Corporation; The Westfield Railroad Company; The Wheeling and Lake Erie Railway Company; The Wiggins Ferry Company; Yale Short Line Railroad Company; The Youngstown & Ohio River Railroad Company; and Southern Railway Company

[fol. 114] No. 23888

ASHLAND BY-PRODUCT COKE COMPANY; THE IRONTON BY-PRODUCT COKE COMPANY, and SEMET-SOLVAY COMPANY

vs.

THE AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY; The Akron & Barberton Belt Railroad Company; Aliquippa and Southern Railroad Company; The Ann Arbor Railroad Company; The Baltimore and Ohio Railroad Company; Bessemer and Lake Erie Railroad Company; Boyne City, Gaylord and Alpena Railroad Company; Buffalo, Rochester and Pittsburgh Railway Company; Central Indiana Railway Company; The Chesapeake and Ohio Railway Company; Chicago and Eastern Illinois Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Kalamazoo and Saginaw Railway Company (The New York Central Railroad Company, Lessee); The Cincinnati, Georgetown Railroad Company; The Cincinnati Northern Railroad Company (The New York Central Railroad Company, Lessee); Cincinnati, Saginaw and Mackinaw Railroad Company (Grand Trunk Western Railroad Company, Lessee); The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (The New York Central Railroad Company, Lessee); The Cleveland, Painesville and Ashtabula Railroad Company; Coudersport and Port Allegany Railroad Company; Dayton and Union Railroad Company; The Dayton-Xenia Railway Company; Delray Terminal Rail-

road Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit Terminal Railroad Company; Detroit, Toledo and Ironton Railroad Company; Eastern Michigan Railways; Eastern Michigan Toledo Railroad; Erie & Michigan Railway & Navigation Co.; Erie Railroad Company; Evansville & Ohio Valley Railway Company and William A. Carson, Receiver; The Fairport, Painesville and Eastern Railroad Company; Fort Wayne-Lima Railroad Company; Fort Wayne Union Railway Company; Grand Trunk Western Railroad Company; The Hamilton Belt Railway Company; Illinois Central Railroad Company; Indiana Northern Railway Company; The Indianapolis Union Railway Company; The Lake Erie and Eastern Railroad Company; The Lake Shore Electric Railway Company; The Lima & Defiance Railroad Company; [fol. 115] Louisville and Nashville Railroad Company; Ludington & Northern Railway; Manistee and Northeastern Railway Company; The Michigan Central Railroad Company (The New York Central Railroad Company, Lessee); The Monongahela Connecting Railroad Company; The Monongahela Railway Company; Montour Railroad Company; Muncie and Western Railroad Company; Muskegon Railway and Navigation Company; The Newburgh and South Shore Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; Norfolk and Western Railway Company; The Northern Ohio Railway Company; The Ohio Public Service Company; The Ohio River and Western Railway Company; The Pennsylvania-Ohio Power and Light Company; The Pennsylvania Railroad Company; Pere Marquette Railway Company; Pittsburgh, Allegheny & McKees Rocks Railroad Company; The Pittsburgh and Lake Erie Railroad Company; Pittsburgh and Ohio Valley Railway Company; The Pittsburgh & West Virginia Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Lisbon & Western Railroad Company; Port Huron and Detroit Railway Company; The River Terminal Railway Company; Southern Railway Company; The Toledo & Indiana Railroad Company; Toledo and Western Railway Company; The Toledo, Angola & Western Railway Company; The Toledo, Bowling Green and Southern

Traction Company; The Toledo Terminal Railroad Company; Union Railroad Company (Pittsburgh, Pa.); Wabash Railway Company; Western Allegheny Railroad Company; The Wheeling and Lake Erie Railway Company; Wyandotte Terminal Railroad Company; The Youngstown and Northern Railroad Company; The Youngstown & Ohio River Railroad Company and J. D. Dewees, Receiver; Detroit, Caro and Sandusky Railway Company; and the Youngstown & Suburban Railway Company.

No. 23160 (Sub-No. 1)

METROPOLITAN UTILITIES DISTRICT OF THE CITY OF OMAHA, NEBRASKA

vs.

ILLINOIS CENTRAL RAILROAD COMPANY et al.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things [fol. 116] involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

It is ordered, That the above-named defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before September 15, 1933, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of coke, coke breeze, coke dust, and coke screenings, in carloads, from and to the points designated in the next three succeeding paragraphs hereof rates which exceed those prescribed in said paragraphs.

It is further ordered, That said defendants in Nos. 23173, 23173 (Sub-No. 1), 23375, 23375 (Sub-No. 1), and 23888, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 15, 1933, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the interstate transportation of coke, coke breeze, coke dust, and coke screenings, in carloads, between points in

central territory and Illinois territory rates which shall not exceed rates based on the distance scale set forth in Appendix No. 8, column 2, except that to destinations in Michigan Zone C the rates shall not exceed rates based on the distance scale set forth in Appendix No. 8, column 3; provided, however, that the present authorized emergency increases may be added to the rates herein prescribed.

It is further ordered, That said defendants in Nos. 23173 and 23173 (Sub-No. 1), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 15, 1933, upon notice as aforesaid and thereafter to maintain and apply to the transportation of coke, coke breeze, coke dust, and coke screenings, in carloads, from Ashland, Ky., and Ironton and Portsmouth (New Boston), Ohio, to destinations in Wisconsin, except that portion in Illinois territory, Iowa, Missouri, Nebraska, South Dakota, and Minnesota rates which shall not exceed (a) to destinations in Zone 1, and extended Zone C in Wisconsin, of western trunk-line territory as described in Western Trunk Line Class Rates, 164 I. C. C. 1, 200, 210, rates based on the distance scale set forth in Appendix No. [fol. 117] 8, column 3, and (b) to destinations west and south of Zone 1, rates based on that scale applied to the entire distance, plus the distance arbitraries set forth in Appendix No. 8, column 4, for application to that part of the hauls west and south of Zone 1; provided, however, that the present authorized emergency increases may be added to the rates herein prescribed.

It is further ordered, That said defendants in No. 22052, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before September 15, 1933, upon notice as aforesaid, and thereafter to maintain and apply to the transportation of coke, coke breeze, coke dust, and coke screenings, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio and southern peninsula of Michigan, rates which shall not exceed rates based on the distance scale set forth in Appendix No. 8, column 3; provided, however, that the present authorized emergency increases may be added to the rates herein prescribed.

It is further ordered, That the complaint in No. 23160 (Sub-No. 1) be, and it is hereby, dismissed.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

No. 16243

INDIANA COKE & GAS COMPANY et al.

vs.

AHNAPEE & WESTERN RAILWAY COMPANY et al.

No. 16611

CITIZENS GAS COMPANY OF INDIANAPOLIS

vs.

ALABAMA CENTRAL RAILWAY et al.

No. 19363

MILWAUKEE COKE & GAS COMPANY

vs.

AHNAPEE & WESTERN RAILWAY COMPANY et al.

[fol. 118] No. 19403

BY-PRODUCTS COKE CORPORATION

vs.

AHNAPEE & WESTERN RAILWAY COMPANY et al.

No. 19378

ZENITH FURNACE COMPANY

vs.

ALGOMA CENTRAL & HUDSON BAY RAILWAY COMPANY et al.

No. 19387

CHICAGO BY-PRODUCTS COKE COMPANY

vs.

AHNAPEE & WESTERN RAILWAY COMPANY et al.

It appearing, That on May 14, 1929, division 4 made and filed its report and entered its order in the above-entitled proceedings, which order was amended by orders of July 19, 1929, and September 5, 1929, and on June 30, 1933, the Commission, by appropriate order, reopened said proceed-

ings and assigned them to division 4 for disposition in connection with I. & S. Docket No. 3511, Coke Between Points in Central and Illinois Territories, and consolidated cases;

It further appearing, That the Commission, by division 4, has, on the date hereof, made and filed a report in I. & S. Docket No. 3511 and consolidated cases, embracing therein the above-entitled proceedings, which said report and the aforesaid report and order of May 14, 1929, as amended by orders of July 19, 1929, and September 5, 1929, are hereby referred to and made parts hereof:

It is ordered, That the order entered herein on May 14, 1929, as amended by orders of July 19, 1929, and September 5, 1929, in the above-entitled proceedings, be, and it is hereby, vacated in so far as it is inconsistent with the findings and order herein in I. & S. Docket No. 3511 and consolidated cases referred to in the next preceding paragraph.

[fols. 119-120] Fourth-Section Order No. 11156

Coke Between Points in Central and Illinois Territories

1. It is ordered, That subject to the provisions of paragraph 2 hereof, carriers respondents and defendants in Investigation and Suspension Docket No. 3511, and proceedings consolidated and considered therewith, as indicated in the report of this Commission entered on the date hereof, which report is hereby referred to and made a part hereof, be, and they are hereby, authorized to establish and maintain over all routes, for the transportation of coke, coke breeze, coke dust, and coke screenings, in carloads, from, to, or between points in the territories considered in the said report, the lowest rates prescribed or approved therein as maximum rates over any route between such points, and to maintain higher rates from, to, or between intermediate points; Provided, That the rates from, to, or between such higher-rated intermediate points shall not exceed the rates prescribed or approved therein, or the lowest combination of rates subject to the Interstate Commerce Act.

2. It is further ordered, That the relief granted in paragraph 1 hereof, shall continue in full force and effect for a period of six months from the effective date of the rates authorized in said paragraph 1: Provided, That in those instances in which applications in accordance with Rule XVIII of the Rules of Practice of this Commission for

authority to continue any of the said rates for more than six months shall have been filed with this Commission within five months from the establishment of the rates authorized herein, the rates covered by said applications may be continued until the said applications have been determined.

By the Commission, division 4.

George B. McGinty, Secretary. (Seal.)

[fol. 121] (Copy)

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA—Filed August 27, 1936

United States of America, one of the defendants in the above entitled cause, for answer to the bill of complaint filed therein against it, says:

I

United States admits the truth of the allegations contained in section I of the bill of complaint.

II

Answering sections II, III, and IV of the bill of complaint, United States admits that this suit is brought to enjoin certain orders of the Interstate Commerce Commission; that United States of America is, by statute, a necessary party to the suit; that the Interstate Commerce Commission is charged with the administration of the Interstate Commerce Act; and that this court, when constituted as required by statute, has jurisdiction over the subject matter of this suit.

III

Answering section V of the bill of complaint, United States admits that the Interstate Commerce Commission made and entered the reports and orders mentioned in said section of the bill; admits that Exhibits "D", "A", and

"B" to the bill are true and correct copies of the three successive reports and orders made and entered by the Com-
[fol. 122] mission in the consolidated proceedings mentioned in said section V; that the first of said three reports (Exhibit "D" to the bill) contains the language quoted in said section V, but denies that the allegations of said section V contain a full, true, and complete statement of all findings, statements, conclusions, and requirements set forth in said reports and orders of the Commission, and for full and complete information concerning the Commission's statements, findings, conclusions, and requirements made and contained in said reports and orders (annexed as Exhibits "D", "A" and "B" to the bill), the court is respectfully referred to the full text thereof. Said reports are hereby referred to and made a part of this answer. United States further admits and alleges that in the proceedings in which said reports and orders were issued, the Commission conducted full hearings at which it heard, received, and considered voluminous testimony of all interested parties, including the plaintiffs, bearing upon the issues involved in said proceedings. United States alleges that all other statements and allegations contained in said section V, except those herein expressly admitted, are irrelevant and immaterial to the issues in this case, but hereby denies such statements and allegations if they should become relevant or material.

IV

United States denies the matters, things, and conclusions alleged in sections VI, VII, and VIII of the bill of complaint, and denies that said orders of the Commission are erroneous, invalid, unlawful, or void for the reasons therein alleged or for any other reason.

V

Except as herein expressly admitted, United States denies each and every allegation contained in the bill of complaint and in the several separate paragraphs thereof.

Wherefore, having fully answered the bill of complaint, United States prays that the relief therein prayed be denied
[fol. 123] and that the bill be dismissed with costs to the

plaintiffs, and that it have such other and further orders, decrees, or relief as may be just and proper.

Elmer B. Collins, Special Assistant to the Attorney General. John Dickinson, Assistant Attorney General. Michael L. Igoe, United States Attorney.

[fols. 124-125] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fols. 126-127] (Copy)

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTING CAUSE FOR HEARING

It appearing that the plaintiffs have heretofore filed their bill of complaint in the above proceeding, seeking to enjoin and set aside certain orders of the Interstate Commerce Commission, therein described, and praying for a preliminary or interlocutory injunction,

It is Ordered by the court that said application for preliminary or interlocutory injunction in the above-entitled cause be, and it is hereby, set for hearing on Saturday, October 17, 1936, at the hour of 8 o'clock A. M., Central Standard time (9 o'clock A. M., Chicago Daylight Saving time), and Honorable Evan A. Evans, United States Circuit Judge for the Seventh Circuit, and Honorable Charles E. Woodward, United States District Judge for the Northern District of Illinois, are called to the assistance of this court to hear and determine said application.

Dated this 28th day of August, 1936.

John P. Barnes, Judge.

[fol. 128] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed August 31, 1936

The Interstate Commerce Commission, one of the defendants in the above-entitled suit, now and at all times

hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiffs' bill of complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph I of the bill of complaint, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

II

Answering paragraph II of the bill of complaint, the Commission admits, for the purposes of this suit, that the allegations therein contained are true, except that it alleges that the Act to Regulate Commerce was approved on February 4, 1887, instead of on February 28, 1887, as alleged in said paragraph.

[fol. 129]

III

Answering paragraph III of the bill of complaint, the Commission admits that it made the report in its Investigation and Suspension Docket No. 3985, entitled Coke from Alabama and Tennessee to Central Territory, 208 I. C. C. 281, decided March 11, 1935, and the order of March 11, 1935, in said proceeding, copies of which are attached to the bill of complaint as Exhibit A. The Commission also admits that it made the report on reconsideration in said proceeding, entitled Coke from Alabama and Tennessee to Central Territory, 215 I. C. C. 384, decided April 30, 1936, and the order of April 30, 1936, copies of which are attached to the bill of complaint as Exhibit B. The Commission also admits that it made the order of April 30, 1936, in its Investigation and Suspension Docket No. 4198, Coke from Southern Points to Central Territory, a copy of which is attached to the bill of complaint as Exhibit C.

IV

Answering paragraph IV of the bill of complaint, the Commission admits, for the purposes of this suit, that the allegations therein contained are true.

V

Answering paragraph V of the bill of complaint, the Commission admits that Division 4 of the Commission, comprised of Commissioners Meyer, Eastman and Mahaffie, made the report entitled Coke between Points in Central and Illinois Territories, 194 I. C. C. 640, decided June 30, 1933, and the order of June 30, 1933, in said proceeding, copies of which are attached to the bill of complaint as Exhibit D. Said report and order were made in a consolidated proceeding embracing Investigation and Suspension Docket [fol. 130] No. 3511, a proceeding instituted by the Commission under section 15(7) of the Interstate Commerce Act, and several formal complaints filed with the Commission by various coke producers and shippers and others, under section 13(1) of said act. In said proceeding there were involved the issues, among others, (1) of the reasonableness of the railroad rates on coke within what is known as central and Illinois territories, embracing the States of Illinois, Indiana and Ohio, and portions of the States of Michigan, Pennsylvania, and West Virginia, hereinafter called central territory, (2) of the reasonableness of the railroad rates on coke from four points in the Birmingham district, hereinafter called Birmingham, namely, Dolcito Junction, Alabama City, Holt and Woodward, Ala., to certain destinations in central territory, and (3) the question whether the latter rates were unduly prejudicial to the Alabama shippers as compared with the rates accorded their competitors located at Chattanooga, Tenn., in southern territory, and at various origins in central territory.

After full hearing and regular procedure Division 4, by said report of June 30, 1933 (Exhibit D to the bill of complaint), prescribed as maximum reasonable rates for application within central territory the scale set out in column 2 of Appendix 8 to said report, pages 689 and 690, hereinafter referred to as column 2 scale, and also prescribed as maximum reasonable rates for application from the four southern points of origin in southern territory named above to destinations in central territory the scale set out in column 3 of said Appendix 8, hereinafter referred to as column 3 scale. The column 3 scale was approximately 10 per cent higher than the column 2 scale. By its order of June 30, 1933, issued with and as part of the aforesaid report of the [fol. 131] same date, Division 4 ordered, among other

things, that the rail carriers, defendants and respondents in said proceeding, establish and make effective said column 2 and column 3 scales on or before September 15, 1933. By amendatory orders this effective date was extended to March 15, 1934.

Said column 2 and column 3 scales were prescribed not as specific rates, nor as minimum rates, but as maximum reasonable rates and nothing in said order prevented the carriers from either continuing in effect or establishing and thereafter maintaining rates lower than the maximum reasonable rates prescribed therein. Many of the rates applicable within central territory were higher than said column 2 scale and many were lower. In the exercise of their discretion the carriers in central territory decided to establish rates at the full maximum level set out in said column 2 scale, and, by tariffs published and filed in the manner prescribed by section 6 of the Interstate Commerce Act, they reduced their rates applicable between points of origin and destination within central territory that were higher than the column 2 scale down to the basis of that scale and increased the rates lower than said scale up to the basis of said scale, with certain exceptions, and said rates became effective March 15, 1934.

The carriers in southern territory, acting under unrestricted concurrences previously given them by the central territory carriers, published and filed, in the manner prescribed by section 6 of said act, rates from said points of origin in southern territory to points of destination in central territory no higher than the column 3 scale, but, in the exercise of their discretion, decided not to increase any of said interterritorial rates which were lower than the column 3 scale. They made no changes in the coke rates from Chattanooga except in instances where the rate from Chat-
[fol. 132] tanooga to a given destination in central territory was higher than the rate over the same route to the same destination from Birmingham. In these instances, in order to eliminate departures from the long-and-short-haul clause of the fourth section of the Interstate Commerce Act, they reduced the rate from Chattanooga to the basis of the rate from Birmingham. They did not make any changes in the rates from Wise County, Va., another coke-producing district in southern territory. Said interterritorial rates became effective March 15, 1934.

Thereafter certain of the central territory carriers filed with the Commission notices of revocation of their concurrences previously issued to the southern carriers, accompanied by new concurrences restricting the authority of the southern carriers so as to permit them to publish joint rates from any origin in southern territory to central territory only on basis of the full maximum rates prescribed in said column 3 scale. Thereupon the southern carriers published and filed with the Commission tariffs proposing new joint rates on coke, on basis of the full maximum column 3 scale, from Birmingham, Chattanooga, and certain origins on the lines of the Louisville & Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., to certain points in central territory, namely, points to which the southern coke shippers had made or probably would make shipments. From Birmingham and from points in Wise County, Va., these proposed new rates were increases while from Chattanooga they were reductions in some instances and increases in others. Carriers with lines in Illinois that also served southern origins or had direct connections with carriers serving southern origins, such as the Illinois Central Railroad Company, the Chicago & Eastern Illinois Railway Company, the Chicago & North Western Railway Company and the Chicago, Burlington & Quincy Railroad Company, did not cancel their unrestricted con- [fol. 133] currences to the southern carriers, and there was no proposal to establish the column 3 scale rates over such routes, with the result that the rates to some points in Illinois and Indiana including Chicago would have been lower over some routes than others. The tariffs publishing said proposed new joint rates carried effective dates of May 1, 1934 and August 3, 1934. Prior to said effective dates the southern carriers themselves and also the southern coke shippers filed protests with the Commission against said proposed joint rates and also against the aforesaid notices of revocation of old unrestricted concurrences and the aforesaid new restricted concurrences. By orders dated April 30, 1934 and July 30, 1934, the Commission, exercising the power conferred upon it by section 15(7) of the Interstate Commerce Act, suspended said proposed joint rates and said revocation notices and concurrences and entered upon a hearing concerning their lawfulness under the Interstate Commerce Act. This proceeding brought in issue for the

first time the reasonableness of coke rates from southern origins other than Birmingham.

After full hearing and regular procedure the Commission, by the aforesaid report and order of March 11, 1935 (Exhibit A to the bill of complaint), decided the issues involved in said proceeding, and found, among other things, that joint rates from southern territory to central territory made by applying the column 2 scale from origins to destinations and adding thereto reasonable arbitraries as set forth in the appendix to said report, page 293, for hauls in southern territory, were and for the future would be maximum reasonable rates. It further found that the suspended schedules had not been justified, and by its said order of March 11, 1935, required the respondents to cancel said schedules on or before May 1, 1935.

On March 20, 1936 and March 28, 1936, the southern coke shippers filed petitions with the Commission requesting re- [fol. 134] consideration of its decision and order of March 11, 1935. Replies to these petitions were filed by coke producers and shippers in central territory and by the railroads in central territory on April 7, 1936. By order of April 15, 1936, the Commission reopened the proceeding for reconsideration on the record as it then stood. On April 30, 1936, the Commission issued its report on reconsideration (Exhibit B to the bill of complaint) in which it affirmed the finding that the suspended schedules had not been justified, and made a further finding as follows, page 387:

"We further find that rates on coke, in carloads, from the Birmingham district, Chattanooga, Tenn., and origins on the Louisville & Nashville and Interstate in Wise County, Va., to destinations in central and Illinois territories, for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix and based on the distances over the shortest routes over which carload traffic can be moved without transfer of lading. Specific rates should be published to all destinations to which shipments are likely to move. The orders entered in Coke Between Points in Central and Illinois Territories, supra, and the orders entered in the original report herein, to the extent that they require the establishment and maintenance of rates on coke, in carloads, from and to the points under consideration, which are higher than those prescribed

herein for application from and to the same points, should be, and they are hereby, vacated and set aside."

The prescribed scale, set out in the appendix on page 388 of the last-mentioned report, although not identical with, is similar to the column 2 scale prescribed in Appendix 8 of the original report of Division 4 of June 30, 1933, 194 I. C. C., at pages 689-690, the former being identical with the latter insofar as rates for distances between 160 and 800 miles are concerned. The aforesaid order of April 30, 1936, issued with and as part of the aforesaid report of the same date (Exhibit B to the bill of complaint), directed that the last-mentioned scale of rates be established in the manner prescribed in section 6 of the Interstate Commerce Act and made effective on or before August 13, 1936. Tariffs nam- [fol. 135] ing rates in accordance with said scale were duly filed with the Commission and said rates became effective on August 13, 1936, and are now in force.

VI

Answering paragraph VI of the bill of complaint, the Commission denies the allegation that its report and order of April 30, 1936, was made without hearing and alleges that in said proceeding a full hearing was had, at which a large volume of evidence consisting of oral testimony of witnesses and voluminous documentary exhibits was introduced. The report of April 30, 1936, on reconsideration, followed the aforesaid petitions for reconsideration, the aforesaid replies thereto and the aforesaid order of the Commission reopening the proceeding for reconsideration on the then-present record. Plaintiffs herein, who were respondents in said proceeding before the Commission, in making their aforesaid replies to said petition for reconsideration made no suggestion that the full facts were not before the Commission and made no request for the submission of further evidence.

The Commission denies the allegation that by its said report and order of April 30, 1936, it prescribed and ordered the third successively lower basis of rates within a period of three years.

The Commission admits the allegation that in each of the three reports and orders referred to it prescribed the basis of rates set out in the report as reasonable maximum rates.

The Commission denies the allegation that none of the

rates prescribed was ever permitted to become effective. As hereinbefore alleged, interterritorial rates not higher than the column 3 scale were published and filed with the Commission and were permitted to and did become effective [fol. 136] March 15, 1934. Thereafter proposed changes in the interterritorial rates published following the proposed revocation of concurrences were suspended, by suspension orders in Investigation and Suspension Docket No. 3985. These proposed changes were found not justified and were required to be canceled. After the rendering of the Commission's report of March 11, 1935, in Investigation and Suspension Docket No. 3985 (Exhibit A to the bill of complaint), the respondents filed tariffs with the Commission in purported compliance with the report and order therein, but before said rates became effective the Commission reopened that proceeding for reconsideration, and, by order dated April 30, 1936, in Investigation and Suspension Docket No. 4198, a copy of which order is attached to the bill of complaint as Exhibit C, the Commission suspended said rates, and those suspended rates were canceled by the tariffs issued in compliance with the Commission's final order in Investigation and Suspension Docket No. 3985, dated April 30, 1936 (Exhibit B to the bill of complaint), and said rates became effective August 13, 1936.

The Commission neither admits nor denies the allegations "That the rates prescribed in the third successive order, dated April 30, 1936, are materially lower than those prayed for by the petitioners before the Commission, and are materially lower than the basis which said petitioners before the Commission represented as a maximum reasonable basis of rates", for the reason that said allegations are immaterial and irrelevant and without legal significance.

The Commission denies the allegation "That the basis of rates prescribed by the Commission in said orders are less than reasonable maximum basis of rates which the Commission is without lawful power or authority to prescribe."

[fol. 137] VII

Answering paragraph VII of the bill of complaint, the Commission denies all the allegations therein and denies that its findings and orders referred to are either erroneous or invalid or unlawful or void for the reasons set forth in said paragraph or for any other reason.

The Commission particularly denies the allegation that said orders prescribe and require plaintiffs to maintain rates which are less than reasonable maximum rates. In this connection the Commission especially calls the Court's attention to its finding in its report on reconsideration of April 30, 1936 (Exhibit B to the bill of complaint), page 387, that the interterritorial rates in question for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix to said report.

The Commission also particularly denies the allegation that said orders of the Commission prescribe and order plaintiffs to publish and maintain rates which result in the undue preference of manufacturers and shippers located in the South and undue prejudice of the manufacturers and shippers located in the North. In this connection the Commission calls the Court's attention to its finding in its report of March 11, 1935 (Exhibit A to the bill of complaint), page 290, that "Rates on coke from the South to points in central territory, on the basis of the column 2 rates, would not be unduly prejudicial to shippers of coke within central territory or unduly preferential of southern shippers." The Commission also calls the Court's attention to the fact that in its report on reconsideration, decided April 30, 1936 (Exhibit B to the bill of complaint), page 385, it affirmed its earlier finding in this regard.

[fol. 138] The Commission also particularly denies the allegation that it "proceeded upon the erroneous assumption and misapprehension that joint line transportation is required in central territory as it is in every instance from southern origins to central territory destinations, and that the joint through rates would be divided either on a mile-for-mile basis between the southern carriers and the central territory carriers, plaintiffs herein, or on a basis which would yield to the plaintiffs the same earnings as they obtain for transporting coke on their own lines within central territory." In this connection the Court's attention is called to the fact that the column 2 scale of rates prescribed for application within central territory and now in effect, against which plaintiffs make no complaint, apply for joint-line as well as single-line transportation. The Commission also calls the Court's attention to the fact that the question of divisions as between the carriers in southern and central territories of the prescribed joint interterritorial rates were

not in issue in the aforesaid proceedings. The respective carriers are free to agree upon the divisions of said joint rates but in the event of any dispute in this regard the Commission may, under the authority conferred upon it by section 15 (6) of the Interstate Commerce Act, prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers.

VIII

Answering paragraph VIII of the bill of complaint, the Commission denies that plaintiffs for the reasons set forth in said paragraph or for any other reason will suffer either irreparable damage or injury or any legal injury.

Further answering said paragraph VIII and further answering paragraphs III to VII, both inclusive, of the bill [fol. 139] of complaint, the Commission alleges that in the aforesaid proceedings the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in and by said reports and orders was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiffs, by counsel for said parties; that in briefs filed in said proceedings questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, and the Commission determined said matters as aforesaid and entered and served upon the plaintiffs and upon other interested parties its said reports and orders; that said reports and orders include the Commission's findings of fact, decisions, conclusions, orders and requirements in the premises, and that, upon the evidence aforesaid, the Commission made the findings and stated the conclusions upon which said reports and orders are based.

The Commission further alleges that the findings and conclusions in said reports were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission respectfully refers the Court to the text of said reports and orders of June 30, 1933, March 11, 1935

and April 30, 1936, for full, complete and accurate information concerning the contents thereof.

[fol. 140] The Commission further alleges that in making said reports it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including matters covered by the allegations of the bill of complaint herein.

The Commission further alleges that none of said orders was made and entered by it either arbitrarily or unjustly or contrary to the relevant evidence, or without evidence to support it; that in making said orders the Commission did not exceed the authority which had been conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the bill of complaint insofar as they conflict either with the allegations herein or with either the allegations or conclusions of fact included in said reports and orders, which reports and orders are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said bill of complaint be dismissed.

Interstate Commerce Commission, by J. Stanley Payne. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fols. 141-142] *Duly sworn to by Hugh M. Tate. Jurat omitted in printing.*

[fol. 143] In United States District Court

[Title omitted]

Petition of Intervention and Answer—Filed October 15, 1936

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Come now the Cincinnati, New Orleans, & Texas Pacific Railway Company, a corporation under the laws of the

State of Ohio, Southern Railway Company, a corporation under the laws of the State of Virginia, Illinois Central Railroad Company, a corporation under the laws of the State of Illinois, Nashville, Chattanooga & St. Louis Railway, a corporation under the laws of the State of Tennessee, and Louisville and Nashville Railroad Company, a corporation under the laws of the State of Kentucky, and move the Court for leave to intervene in the above-styled case, and to become parties thereto, in order to protect their rights involved in such proceeding.

Each of said interveners is and for many years has been engaged in operating a railroad within one or more of the States of Kentucky, Virginia, Tennessee and Alabama, extending in itself or in connection with other railroads and systems into other States of the United States, and is and has been a common carrier of freight by railroad within the States above mentioned, and other States, and between points in said States and other States, and at all times hereinafter mentioned was a common carrier of freight by railroad, subject to the provisions of the Acts of Congress known as the Interstate Commerce Act, and each of said interveners is vitally interested in the subject matter of this complaint, and was, as is averred in Paragraph IV of the bill of complaint, a party to the pro-
[fol. 144] ceeding before the Interstate Commerce Commission, in which the order herein complained of was made, and desires to intervene herein on behalf of the Defendants and, as such, to answer the bill of complaint herein and to participate in the trial of said complaint as a party defendant.

I

Interveners admit the allegations of Paragraphs I, II, III and IV of the bill of complaint.

II

Answering Paragraph V of the bill of complaint, Interveners admit that the Interstate Commerce Commission made and entered the reports and orders mentioned in said Paragraph of the bill of complaint. They admit that Exhibits "D", "A" and "B" to the bill of complaint are true and correct copies of the three successive reports and orders made and entered by the Interstate Commerce Commission in the proceeding mentioned in said Paragraph

V; that Exhibit "D" contains the language quoted in Paragraph V, but denies that the allegations of said Paragraph V contain a full, true or complete statement of all findings, statements, conclusions and requirements as set forth in said reports and orders of the Interstate Commerce Commission, and Interveners ask that reference be made to the decisions and orders of the Interstate Commerce Commission as contained in Exhibits "D", "A" and "B", for a correct statement of the matters, findings, conclusions and orders of the Interstate Commerce Commission involved therein. Said reports and orders are hereby referred to and made a part of this answer. Interveners admit and allege, as appears from said reports of the Interstate Commerce Commission, that, in the proceeding in which said reports and orders were issued, the Interstate Commerce Commission conducted full hearings at which it heard, received and considered testimony, briefs and arguments of all interested parties, including the Plaintiffs, bearing upon the issues involved in said proceedings. Interveners state that all other statements and allegations contained in said Paragraph V, particularly the statements and allega-
[fol. 145] tions concerning the rules and regulations of the Interstate Commerce Commission, are irrelevant and immaterial to the issues in this case, but deny that the rates, which Plaintiffs and Interveners have been required by orders of the Interstate Commerce Commission to maintain for the transportation of coke from the South to the North, were or are illegal as in conflict with any authority granted by Plaintiffs herein, or on any other account.

III

Interveners deny the matters and things and conclusions alleged in Paragraphs VI, VII and VIII of the bill of complaint, and deny that said orders of the Interstate Commerce Commission, or any order of the Commission herein complained of, are or is erroneous, invalid, unlawful or void for the reasons therein alleged, or for any other reason.

Answering further, Interveners specifically deny that the report and order of the Interstate Commerce Commission dated April 30, 1936, in Investigation & Suspension Docket No. 3985, was made without hearing or only on the petitions of several parties, as therein before set out, for reopening and reconsideration on the present record; they state that Plaintiffs herein replied to the petitions of the

"several parties" mentioned, and in the reply so filed, did not petition the Interstate Commerce Commission or otherwise request the Commission to grant them any further hearing, or in any way indicate any purpose or desire on the part of the Plaintiffs herein to have said proceeding finally determined otherwise than upon the "present record".

IV

Except as herein expressly admitted, Interveners deny each and every allegation contained in the bill of complaint, and in the several separate paragraphs thereof.

Wherefore, Interveners pray that the bill of complaint in [fols. 146-147] this cause be dismissed.

The Cincinnati, New Orleans & Texas Pacific Railway Company, Southern Railway Company, Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, by William A. Northcutt, Charles Clark, Chas. P. Reynolds, Wm. H. Swiggart, E. A. Smith.

Duly sworn to by A. R. Smith. Jurat omitted in printing.

[fol. 148] In United States District Court

[Title omitted]

Petition of Intervention—Filed October 15, 1936

To the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Comes now the Alabama Iron & Steel Shippers Conference, a voluntary association of manufacturers, producers and shippers of certain commodities, in the State of Alabama, including the manufacturers and shippers of coke, and moves the Court for leave to intervene in the above-styled case and become a party thereto, in order to protect the rights of its members involved in such proceeding.

I

The order of the Interstate Commerce Commission here sought to be enjoined, set aside, annulled and suspended

prescribe maximum reasonable rates to be maintained by the railroads serving petitioner's members in connection with other railroads and were entered in a proceeding entitled "Coke from Alabama and Tennessee to Central Territory", being Investigation & Suspension Docket No. 3985. Petitioner was a party by intervention to the proceeding [fol. 149] before the Interstate Commerce Commission in which the orders of said Commission, here sought to be enjoined, annulled and set aside, were entered and as such has a right under the Urgent Deficiency Act, 38 Stat. L. 219, to intervene in and appear as a party to the above-entitled proceeding and desires to so intervene herein, in defense of said orders, and to participate in the trial hereof as a party appearing on behalf of the defendants.

II

Intervener alleges that in the proceeding wherein the orders here attacked were entered a full hearing, as provided for in and by the Interstate Commerce Act, was granted to all the parties to said proceeding, including the plaintiffs herein; that much evidence, both oral and documentary, bearing upon the matters covered in and by the reports and orders of the Commission, was submitted to the Commission; that in briefs filed in said proceedings all questions relating to said matters were fully argued and submitted to the Commission for determinatnon on behalf of the parties thereto by their respective counsel; that by its reports and orders the Commission determined the matters presented to it in said proceeding and that the findings and conclusions of the Commission, as set forth in its reports and orders filed with the bill of complaint herein, and each of them, was and is fully supported and justified by the evidence submitted in said proceeding, and that in making said orders the Commission did not exceed the authority which has been conferred upon it and that none of its findings or orders were made either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it, and that said orders were made in the exercise of the authority vested in the Commission by the Interstate Commerce Act after full hearing and in the light of all the evidence presented.

Wherefore your petitioner prays (a) that the Court [fols. 150-151] cause to be entered herein an order permitting your petitioner to file its petition of intervention and become a party in the above-entitled cause, and (b) that the bill of complaint in this case be dismissed.

Respectfully submitted, J. V. Norman, Solicitor for Petitioner. Hugh White, of Counsel.

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENING PETITION OF INTERLAKE IRON CORPORATION, THE LACLEDE GAS LIGHT COMPANY, THE MILWAUKEE COKE AND GAS COMPANY, AND NORTH SHORE COKE & CHEMICAL COMPANY—Filed October 15, 1936

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Your petitioners, Interlake Iron Corporation, The Laclede Gas Light Company, The Milwaukee Coke and Gas Company, and North Shore Coke & Chemical Company, pursuant to leave of court heretofore granted, file herein their intervening petition and thereby show unto your Honors:

I

That your petitioner, Interlake Iron Corporation, is a corporation duly organized and existing under the laws of the State of New York and is a citizen of that State, having its principal business office in the City of Chicago, Illinois, and manufacturing plants at Chicago, Illinois; Toledo, Ohio; Erie, Pennsylvania; and Duluth, Minnesota, where it is engaged, among other things, in the manufacture, sale [fol. 153] and shipment of by-product coke. It is one of the largest producers of commercial coke in this country.

That your petitioner, The Laclede Gas Light Company, is a corporation duly organized and existing under the laws of the State of Missouri and is a citizen of that State, having its principal office and place of business in the City of St. Louis, Missouri, and its manufacturing plant in the

southern portion of St. Louis, Missouri, at what is known as Carondelet (St. Louis), Missouri, where it is engaged, among other things, in the manufacture, sale and shipment of by-product coke.

That your petitioner, The Milwaukee Coke and Gas Company, is a corporation duly organized and existing under the laws of the State of Wisconsin and is a citizen of that State, having its principal office, place of business and manufacturing plant in the City of Milwaukee, Wisconsin, where it is engaged, among other things, in the manufacture, sale and shipment of by-product coke.

Your petitioner, North Shore Coke & Chemical Company is a corporation duly organized and existing under the laws of the State of Delaware and is a citizen of said State, having offices in Wilmington, Delaware, Chicago and Waukegan, Illinois, and its manufacturing plant at Waukegan, Illinois, where it is engaged, among other things, in the manufacture, sale and shipment of by-product coke.

That all of your petitioners manufacture, sell and ship coke by rail to destinations in Central territory in competition with coke which is manufactured in and moves by rail from the southern districts referred to in the bill of complaint.

[fol. 154] II

That the bill of complaint in the above entitled cause is instituted under the provisions of an Act of Congress approved October 22, 1913 (38 Stat. L. 219), Code of Laws of the United States, Title 28, Sections 41 (28), 42-48, inclusive, and seeks to enjoin, set aside, annul and suspend certain orders entered by the Interstate Commerce Commission in its Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, on the 11th day of March, 1935, and on the 30th day of April, 1936, and in Investigation and Suspension Docket No. 4198, Coke from Southern Points to Central Territory, on April 30, 1936.

III

That your petitioners, Interlake Iron Corporation, The Laclede Gas Light Company and The Milwaukee Coke and Gas Company were parties to said proceeding before the Interstate Commerce Commission, known as Investigation and Suspension Docket No. 3985, and that although your

petitioner, North Shore Coke & Chemical Company, was not a party to said proceeding, it is vitally interested in the controversy or question before the Interstate Commerce Commission and in the above entitled suit to enjoin, set aside, annul and suspend the orders of the commission in that proceeding, as are the other petitioners herein, by reason of the said competition between it and the southern coke producers at points in Central Freight Association territory.

That Section 45-a of said Act of Congress (Code of Laws of the United States, Title 28, Section 45-a) provides, among other things, that "any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of [fol. 155] their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party;" and also that "communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof;".

IV

That at a general session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 30th day of June, A. D. 1933, in Investigation and Suspension Docket No. 3511 and other dockets consolidated therewith, entitled "Coke Between Points in Central and Illinois Territories", the Interstate Commerce Commission issued a report and certain orders (reproduced at pp. 29-49, both inclusive, of the plaintiffs' bill of complaint herein), in which the commission, among other things, found to be reasonable and ordered the carriers to establish rates not in excess of a scale of rates, hereinafter referred to as "column 2 rates", for application to shipments of coke within and between points in Central and Illinois territories, and also found to be reasonable and prescribed rates not in excess of a scale of rates, hereinafter referred to as "column 3 rates", for application to shipments of coke from

producing points in the South to destinations north of the Ohio River in Central and Illinois territories. The column 3 rates are approximately 10 per cent higher than the column 2 rates.

[fol. 156] That thereafter, the northern railroads, including the plaintiffs herein, published the maximum scale of rates prescribed by the Interstate Commerce Commission, which rates became effective March 15, 1934 and were applicable to shipments of coke made by your petitioners and other northern producers of coke to destinations in Central and Illinois territories, but the southern railroads serving the coke-manufacturing districts in Alabama, Tennessee and Virginia failed to publish the maximum reasonable rates authorized by the commission until several months later in 1934. Before said rates became effective, said southern carriers and southern producers petitioned the commission for the suspension of said rates, and the commission did suspend said rates in a proceeding designated "Investigation and Suspension Docket No. 3985." Following a hearing, the commission, on March 11, 1935 entered its report and order (reproduced at pp. 21-22 of the plaintiffs' bill of complaint herein), in said I. & S. Docket No. 3985 wherein the commission found that the rates (which had been published in compliance with and in pursuance of the orders dated June 30, 1933, of said commission in I. & S. Docket 3511) had not been justified by the plaintiffs herein, and the commission ordered the suspended schedules cancelled without prejudice to the filing of a new and lower basis of maximum rates, which basis averaged approximately 107 per cent of the column 2 rates.

That thereafter, the southern carriers and their northern connections published the maximum basis of rates so prescribed from the South to the North effective May 2, 1936, but before the effective date, the Illinois Central and certain southern railroads and producers again petitioned the commission to suspend said rates. This the commission again did by its order dated April 30, 1936 (reproduced at [fol. 157] pp. 27-28 of the plaintiffs' bill of complaint herein), in a proceeding entitled Investigation and Suspension Docket No. 4198. Also, on the same date, April 30, 1936, but without further hearing, said commission entered its second report and order (reproduced at pp. 23-25 of the plaintiffs' bill of complaint herein), prescribing a still lower basis of maximum rates from the South to the North,

said basis being the column 2 basis, the same as that applicable within the North, and required plaintiffs to establish rates not in excess thereof on or before August 13, 1936. Said report and order of April 30, 1936, was made on petitions of several parties for reopening and reconsideration on the record and no further hearing was accorded to your petitioners or the plaintiffs herein. This reduction in interterritorial rates on coke from the South to the North constituted the third successively lower basis of rates prescribed by the commission within a period of three years.

Your petitioners further say that the maximum rates prescribed by the orders of the commission dated March 11, 1935, and April 30, 1936, are less than maximum reasonable rates and that said rates are unduly prejudicial to your petitioners and unduly preferential of their competitors, the southern producers of coke, in violation of Section 3 of the Interstate Commerce Act, and that if said orders of the commission are not enjoined, annulled and set aside by this court the rates resulting therefrom will adversely affect the ability of your petitioners to compete with southern producers of coke, thereby causing irreparable damage and injury to the business of your petitioners.

V

That the record before the commission in said Investigation and Suspension Docket No. 3985 shows that the traffic [fol. 158] density as a whole in Southern territory is much less than in Central Freight Association territory. The fact is well known that rates for the movement of freight in a territory having a traffic density higher than in another territory generally are lower than the rates for the movement of traffic in the territory of lesser traffic density. It is a matter of common knowledge that rates, generally, from the South to the North are higher, mile-for-mile, than the rates from points of origin in the North to the same northern destinations; also that on traffic moving from the North to the South the rates are higher, mile-for-mile, than on traffic moving in the North in order to compensate for that portion of the haul which takes place in southern territory where the traffic density is less than in northern territory. Thus, the failure of the commission in the order in this case to take cognizance of the difference in general traffic densities in the North and in the South tends to

equalize not only the disadvantages of the South in the matter of proximity to the large northern markets, but also the differences in transportation and competitive conditions, which the commission is not authorized to do under the Interstate Commerce Act. The record before the commission shows that the southern producers have shipped considerable quantities of coke to destinations in the North under rates which were higher than the rates prescribed by the commission in the reports and orders under review in the above entitled proceeding, and that the southern producers did not need the same level of rates from the South to the North as apply within the North in order to compete with the northern producers.

VI

Your petitioners respectfully represent that the findings and orders of the Interstate Commerce Commission of March [fol. 159] 11, 1935, and April 30, 1936, in said Investigation and Suspension Docket No. 3985, and the order of the commission of April 30, 1936, in said Investigation and Suspension Docket No. 4198, are erroneous, invalid, unlawful and void for the following reasons:

(a) Said findings and orders are unsupported by and contrary to the evidence of record properly before said commission in the proceedings in which they are made, and that said findings and orders are arbitrary, unjust and against the indisputable character and manifest weight of the evidence.

(b) Said findings and orders are inconsistent and in conflict with former findings and orders of said commission and are based upon erroneous and incorrect statements of the law and misapprehensions and misapplications of the evidence.

(c) That the rates ordered by the Interstate Commerce Commission to be cancelled in its order of March 11, 1935, in Investigation and Suspension Docket No. 3985, are the rates which the commission found to be just, reasonable and lawful maximum rates for application from southern producing points to destinations in Central and Illinois territories, in its report and order dated June 30, 1933, in Investigation and Suspension Docket No. 3511 and dockets consolidated therewith.

(d) That there was no substantial evidence before the commission showing or tending to show that the bases or scales of rates prescribed in said orders for the transportation of coke from the South to Central territory would be reasonable maximum bases of rates, or that the basis of rates prescribed by the commission in Investigation and [fol. 160] Suspension Docket No. 3511 for application from southern origins to Central territory exceeds a reasonable maximum basis.

(e) There are no findings of fact or changed facts in the evidence of record to support the conclusion of the commission in Investigation and Suspension Docket No. 3985 that the basis prescribed and ordered to become effective for the transportation of coke from the South to Central territory in said order of the commission in Investigation and Suspension Docket No. 3511, dated June 30, 1933, had become unreasonable on March 11, 1935, and that the basis prescribed and ordered to become effective in its report and order in Investigation and Suspension Docket No. 3985, dated March 11, 1935, had become unreasonably high or otherwise unlawful on April 30, 1936.

(f) That said orders require the plaintiffs to maintain rates which are less than reasonable maximum rates, which action of said commission is arbitrary, unjust and without lawful authority.

(g) That said orders prescribe and require plaintiffs to publish and maintain rates which unduly prefer manufacturers and shippers of coke located in the South and unduly prejudice your petitioners and other manufacturers and shippers of coke located in the North, contrary to and in violation of the provisions of Section 3 of the Interstate Commerce Act.

(h) That the order dated April 30, 1936, in said Investigation and Suspension Docket No. 3985, was made without further hearing and only on petitions of said southern carriers and shippers for reopening and reconsideration, and said order is arbitrary, unjust, and without any evidence to support it.

[fol. 161] (i) That the following finding of the commission in its report in Investigation and Suspension Docket No. 3985, dated April 30, 1936, is contrary to the law and the evidence and without substantial evidence to support it:

"The producers of coke in Official territory have no just ground for complaint against interterritorial rates in the South to central territory on the same level, mile-for-mile, as those they pay."

(j) That the said orders requiring and ordering the plaintiff carriers to join the southern lines in publishing joint through rates from the South to the North which are less than maximum reasonable rates for the sole purpose of enabling the southern producers and carriers to better compete with the producers and carriers in the North in the sale and shipment of coke to destinations in the North, are contrary to the law and beyond the power and authority of the commission.

(k) That the commission proceeded under erroneous constructions of the law and misapprehensions of its powers thereunder in that instead of taking cognizance of the differences in traffic density in the South and in the North and testing the rates by the standards ordinarily employed by said commission, it has tested the rates solely by the level of the rates applicable within the North and the express desires of the southern producers and carriers for the same level of rates from the South to the North for competitive reasons.

(l) That the rates prescribed in the commission's findings and order of April 30, 1936, in Investigation and Suspension Docket No. 3985, are in fact subnormal although termed maximum reasonable rates by the commission, as were the higher bases of rates previously prescribed. The commission proceeded under erroneous constructions of law [fol. 162] and misapprehensions with respect to its powers thereunder in assuming to prescribe subnormal competitive rates as reasonable maximum rates, in order to enable southern shippers to meet alleged commercial exigencies.

(m) That the commission proceeded under an erroneous construction of law and misapprehensions of its powers thereunder in assuming to equalize disadvantages of geographical locations, opportunities, fortunes or abilities in prescribing rates from the South to the North.

(n) That the commission in its said findings and orders proceeded under the erroneous conclusion that the rates

prescribed were necessary to enable the southern producers to sell and ship coke to northern destinations, which conclusion is not supported by and is contrary to the evidence of record.

(o) That said findings and orders will greatly damage and irreparably injure your petitioners.

VII

Your petitioners refer to all the allegations in the plaintiffs' bill of complaint herein, insofar as they are not inconsistent with the foregoing allegations and the claims of your petitioners, and make said allegations part of this petition.

Wherefore, your petitioners pray:

(a) That the court make and cause to be entered herein an order granting leave to your petitioners to intervene in said suit, making said Interlake Iron Corporation, The Laclede Gas Light Company, The Milwaukee Coke and Gas Company, and North Shore Coke & Chemical Company parties plaintiff herein and permitting them to file this their petition of intervention in the above entitled cause.

[fol. 163] (b) That the defendants, United States of America and Interstate Commerce Commission, may be required to make full, true and perfect answer to this petition (but not under oath, answer under oath being hereby expressly waived).

(c) That a temporary injunction or restraining order be entered enjoining and suspending, until further order of this court, the said orders of the Interstate Commerce Commission entered on March 11, 1935 and April 30, 1936, until the final determination of this court.

(d) That this court, upon final hearing of this cause, adjudge, order and decree that the said orders of the Interstate Commerce Commission are beyond the lawful authority of the commission and are without warrant in law and null and void, and that said orders be forever enjoined, suspended, set aside and annulled.

(e) That your petitioners may have such other and further relief in the premises as equity may require and to Your Honors may seem meet.

Interlake Iron Corporation, the Laclede Gas Light Company, the Milwaukee Coke and Gas Company, North Shore Coke & Chemical Company, by Harry I. Allen, Their Solicitor. Harry I. Allen, Adolph J. Radosta, Jr., Solicitors for Petitioners.

[fols. 164-165] *Duly sworn to by Adolph J. Radosta, Jr. Jurat omitted in printing.*

[fol. 166] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF CITIZENS GAS & COKE UTILITY INDIANA GAS & CHEMICAL CORPORATION FOR LEAVE TO INTERVENE HEREIN—Filed October 15, 1936

The Citizens Gas and Coke Utility and Indiana Gas & Chemical Corporation severally pray leave of the Court to intervene herein as parties plaintiff and as grounds of such intervention say:

I. That the Citizens Gas And Coke Utility is the successor in interest of the Citizens Gas Company of Indianapolis and that the Indiana Gas & Chemical Corporation is the successor in interest of Indiana Consumers Gas And By-Products Company; that said Citizens Gas Company of Indianapolis and Indiana Consumers Gas And By-Products Company were parties to Interstate Commerce Commission Investigation and Suspension Docket No. 3985 in which docket the orders of the said Interstate Commerce Commission were entered, which are sought to be enjoined, set aside, annulled and suspended by plaintiffs' bill filed herein; that each of the said parties herein petitioning for leave to inter-[fol. 167] vene, by counsel, attended the hearing before the Interstate Commerce Commission in said cause Investigation and Suspension Docket No. 3985, offered testimony and filed briefs therein; that said parties were also parties to the proceedings before the Interstate Commerce Commission referred to in the bill of complaint herein as Dockets Nos. 23375, 23375-Sub. No. 1 and I. & S. No. 3511.

II. That the Citizens Gas And Coke Utility is engaged in the manufacture of artificial gas, by-product coke and other by-products, with plants and distribution system located at the City of Indianapolis, State of Indiana; that the Indiana Gas & Chemical Corporation is engaged in the manufacture of artificial gas, by-product coke and other by-products, with plants located in the City of Terre Haute, State of Indiana; that each of said companies is a shipper of by-product coke by railroad, in car load lots, via the lines of the common carriers who are plaintiffs herein and their connecting common carriers;

III. That the order of the Interstate Commerce Commission in its Investigation and Suspension Docket No. 3985, dated April 30, 1936, which the bill of complaint herein seeks to enjoin and set aside was made and entered without hearing and without notice and as a consequence is null and void, as alleged in the bill; that said order adversely affects the rights and interests of your interveners named herein;

IV. That the said decision and order of the Interstate Commerce Commission in its Dockets Nos. 23375, 23375-Sub. No. 1, I. & S. 3511 and cases consolidated therewith, established and prescribed a basis of rates on coke in territory generally described as lying north of the Ohio River, and also prescribed a higher basis of rates on coke from points south of the Ohio River to points north thereof; that said [fol. 168] rates were prescribed by an order dated June 30, 1933 after a full and complete hearing; that the said order of April 30, 1936 in I. & S. Docket No. 3985, undertaking to prescribe a lower basis of rates on coke from points south of the Ohio River to points north thereof, provided, among other things the following:

It is further ordered, that the orders heretofore entered in Investigation and Suspension Docket No. 3511, Coke Between Points in Central and Illinois Territories, reported in 194 I. C. C. 641; No. 22052, Alabama By-Products Corp. et al. v. Louisville and Nashville Railroad Company et al., consolidated with and disposed of in the report immediately before referred to; and the aforesaid order of February 3, 1936, as modified by the order of February 21, 1936, to the extent that they require establishment and maintenance of rates on coke, in carloads, from origins in Alabama, Tennessee, and Virginia to destinations in Illinois, Indiana, Ohio,

and the southern peninsula of Michigan, which are higher than those prescribed in the report made a part hereof, for application from and to the same points, be, and they are hereby, vacated and set aside.

And it is further ordered, that this order shall continue in force until the further order of the Commission.

By the Commission.

George B. McGinty, Secretary. (Seal.)

In so far as said order of April 30, 1936 in I. & S. Docket No. 3985 undertakes to change, modify, vacate and set aside the said orders entered on June 30, 1933, in Dockets Nos. 23375, 23375-Sub. No. 1 and I. & S. 3511, as aforesaid, said order of April 30, 1936 in I. & S. Docket No. 3985 is void because said order adversely affects the rights and interests of these interveners and was made without notice and without hearing.

[fol. 169] V. That the interveners named herein are in competition with the producers of coke south of the Ohio River in the sale of such coke at points north thereof; that the said orders of the Commission prescribe, order and require plaintiffs herein to publish, maintain and apply rates and concur in rates from points south of the Ohio River to points north thereof which are lower than a reasonable basis and which result in undue preference of manufacturers and shippers located south of the Ohio River and in undue prejudice of the intervening petitioners herein.

VI. That the said orders of the Interstate Commerce Commission which the bill of complaint herein seeks to enjoin and set aside, are, in fact, invalid, unlawful, arbitrary and void as alleged in the bill of complaint herein and for the reasons therein alleged.

VII. That copies of this petition for leave to intervene have been furnished to counsel of record herein.

Wherefore, your intervening petitioners pray that an order be entered herein allowing them to intervene as parties plaintiff herein.

Samuel D. Royse, Arnet B. Cronk, Solicitors for Intervening Petitioners Named Herein.

[fol. 170] *Duly sworn to by Frederick A. Doebber. Jurat omitted in printing.*

[fol. 171] And on, to wit, the 18th day of December, 1936, there was filed in the Clerk's office of said Court a certain Copy of Commission's supplemental report and Order, in words and figures following, to wit:

[fol. 172] Interstate Commerce Commission

Investigation and Suspension Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

Decided December 7, 1936

Findings in prior report on reconsideration, 215 I. C. C. 384, respecting rates on coke from Birmingham, Ala., Chattanooga, Tenn., and points in Wise County, Va., to destinations in central and Illinois territories, modified by excepting therefrom destinations in Zone C in Michigan

Appearances same as in original report.

SUPPLEMENTAL REPORT OF THE COMMISSION ON RECONSIDERATION

By the Commission:

In the prior report on reconsideration, 215 I. C. C. 384, we found as follows:

We affirm the finding that the suspended schedules have not been justified. We further find that rates on coke, in carloads, from the Birmingham district, Chattanooga, Tenn., and origins on the Louisville & Nashville and Interstate in Wise County, Va., to destinations in central and Illinois territories for the future will be unreasonable to the extent they may exceed rates based on a distance scale set forth in the appendix and based on the distances over the shortest routes over which carload traffic can be moved without the transfer of lading. Specific rates should be published to all destinations to which shipments are likely to move. The orders entered in Coke between Points in Central and Illinois Territories, supra, and the orders entered in the original report herein, to the extent that they require the establishment and maintenance of rates on coke, in carloads, from and to the points under consideration which are higher than those prescribed herein for applica-

tion from and to the same points, should be, and they are hereby, vacated and set aside.

In the above finding we inadvertently failed to specify the destination territory with sufficient particularity.

In Coke Between Points in Central and Illinois Territories, 194 I. C. C. 640, and complaint cases consolidated therewith, division 4 prescribed, inter alia, two distance scales of rates set forth in appendix 8 thereto, one hereafter designated column 2 rates for application between points in central territory, including Illinois but not zone C in Michigan; and the other, herein designated column 3 rates, for application from points in central territory to [fol. 173] destinations in zone C in Michigan and zone 1 in western trunk-line territory and from Alabama City, Holt, Woodward, and Dolcito Junction, Ala., to destinations in central territory.

The testimony in the instant case deals principally, if not solely, with rates to that portion of central territory in which the column 2 rates were prescribed and in which they are now applicable. No contention is made and no evidence was introduced showing that the column 3 rates between points in zone C in Michigan and other points in central territory are not reasonable or that a lower basis is justified from the southern origins to points in zone C.

We hereby modify our prior findings by amending the second sentence of the finding above quoted to read:

We further find that rates on coke, in carloads, from the Birmingham district, Chattanooga, Tenn., and origins on the Louisville & Nashville and Interstate in Wise County, Va., to destinations in Illinois and central territory, except those in that part of central territory described in Eastern Class Rate Investigation, 164 I. C. C. 314, 413 as zone C in Michigan, for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix [1] and based on the distances over the shortest routes over which carload traffic can be moved without transfer of lading.

An amendatory order will be entered.

Commissioner Eastman did not participate in the disposition of this report.

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[1] To the report in 215 I. C. C. 384.

[fols. 174-175] Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of December, A. D. 1936

Investigation and Suspension Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

It appearing, That on March 11, 1935, the Commission made and filed its report in the above-entitled proceeding, and on March 11, 1935, February 3, 1936, and February 21, 1936, entered its orders in said proceeding;

It further appearing, That on April 15, 1936, the Commission reopened said proceeding for further consideration on the present record therein and made and filed its report on reconsideration, and on April 30, 1936, entered its further order in said proceeding;

It further appearing, That the Commission, on the date hereof, has made and filed its supplemental report on reconsideration containing its further findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof.

It is ordered, That the order heretofore entered in said proceeding on April 30, 1936, be, and it is hereby, modified by excepting from the requirements thereof rates for the transportation of coke, in carloads, from the Birmingham, Ala., district, Chattanooga, Tenn., and origins on the lines of the Louisville and Nashville Railroad Company and the Interstate Railroad Company in Wise County, State of Virginia, to destinations in zone C in the State of Michigan as said zone is defined in the report of the Commission made and filed on May 13, 1930, in the proceeding entitled Eastern Class-Rate Investigation, which said report is published and appears in volume 164 of the Interstate Commerce Commission Reports at page 314 et seq.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 176] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 20, 1937

The above-entitled suit coming on to be heard and the Court advised by counsel makes the following

FINDINGS OF FACT

1. The plaintiffs are 19 common carriers engaged in the transporting — coke in interstate commerce within Central Freight Association and Illinois territories, and, under joint rates with southern carriers from points in Alabama, Tennessee and Virginia to destinations in the State of Illinois, Indiana, Ohio and Michigan, hereinafter referred to as central territory. The intervening plaintiffs are engaged in the production and shipping in interstate commerce of coke from various producing points in central territory.

2. The defendants named in the bill are the United States of America and the Interstate Commerce Commission. The intervening defendants are the Alabama Iron and Steel Shippers Conference and the Tennessee Products Corporation in behalf of southern coke shippers and the Louisville & Nashville Railroad Company and other southern carriers participating in the transportation of coke from points of origin in southern territory to points of destination in central territory.

3. Plaintiffs seek to enjoin the order of the Interstate Commerce Commission entered April 30th, 1936, in a pro-[fol. 177] ceeding entitled Coke from Alabama and Tennessee to Central Territory, Investigation and Suspension Docket No. 3985; also an earlier order in said proceeding which was vacated and set aside by said order April 30, 1936, also a suspension order in Investigation and Suspension Docket No. 4198.

4. Upon the trial, it was stipulated that said hearing should be deemed to be the final hearing in this cause.

5. Said order of the Commission of April 30, 1936, required the plaintiffs herein and other carriers by railroad respondents in said proceeding to establish on or before August 13, 1936, and thereafter to maintain and apply for the transportation of coke, in carloads, from the Birmingham, Alabama, district, from Chattanooga, Tenn., and from origins on the lines of the Louisville & Nashville Railroad and the Interstate railroad in Wise County, Va., to destinations in central territory, rates not in excess of certain distance rates specified in said order as follows:

Distance	Rate Cents	Distance	Rate Cents
160 miles and over 140	215	560 miles and over 530	395
180 miles and over 160	225	590 miles and over 560	405
200 miles and over 180	235	620 miles and over 590	415
220 miles and over 200	245	650 miles and over 620	425
240 miles and over 220	255	680 miles and over 650	435
260 miles and over 240	265	710 miles and over 680	445
280 miles and over 260	275	740 miles and over 710	455
300 miles and over 280	285	770 miles and over 740	465
320 miles and over 300	295	800 miles and over 770	475
340 miles and over 320	305	830 miles and over 800	485
360 miles and over 340	315	860 miles and over 830	495
380 miles and over 360	325	890 miles and over 860	505
400 miles and over 380	335	920 miles and over 890	515
425 miles and over 400	345	950 miles and over 920	525
450 miles and over 425	355	980 miles and over 950	535
475 miles and over 450	365	1,010 miles and over 980	545
500 miles and over 475	375	1,050 miles and over 1,010	555
530 miles and over 500	385		

6. The rates prescribed in said order of April 30, 1936, were established and made effective August 13, 1936, as required by said order, and said rates are now in force.

[fol. 178] 7. In a proceeding entitled Coke between Points in Central and Illinois Territories, Investigation and Suspension Docket No. 3511, the Commission, by report and order dated June 30, 1933, 194 I. C. C. 640, prescribed a scale of distance rates as maximum reasonable rates for application within central territory, hereinafter referred to as the Column 2 scale. In said report and order the Commission also prescribed a scale of distance rates as maximum reasonable rates for application interterritorially from four points of origin in southern territory, viz., Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to points of destination in central territory, hereinafter referred to as the Column 3 scale. The Column 3 scale was approximately 10% higher than the Column 2 scale. Said order of June 30, 1933, required that said Column 2 and Column 3 scales be established and made effective on or

before September 15, 1933. By subsequent orders this effective date was extended to March 15, 1934.

8. The central territory carriers established said Column 2 scale within central territory, effective March 15, 1934.

9. The southern territory carriers established, effective March 15, 1934, interterritorial joint rates form Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to points of destination in central territory no higher than the Column 3 scale, but did not increase any of said interterritorial rates that were then lower than the Column 3 scale. These joint rates, applicable over the lines of both southern and central territory carriers, were published by the southern carriers under blanket powers of attorney, referred to as concurrences, previously issued by the central territory carriers and filed with the Commission.

10. Shortly thereafter a number of the central territory carriers filed with the Commission certain schedules, proposed to become effective May 1, 1934, on thirty days' notice, containing notices of revocation of their blanket concurrences in joint rates from southern territory to central territory, and new concurrences authorizing such joint rates only on basis of the full maximum Column 3 [fol. 179] scale. In view of these proposed restricted concurrences, the southern carriers published and filed with the Commission tariff schedules, proposed to become effective May 1, and August 3, 1934, on thirty days' notice, naming new joint rates on coke on basis of the full maximum Column 3 scale from points in the Birmingham, Ala., district, from Chattanooga, and from points in Wise County, Va., to destinations on the lines of such of the central territory carriers as had restricted their concurrences. From the Birmingham district and from points in Wise County, Va., the joint rates so published were increases, while those from Chattanooga were increases in some instances and reductions in others. Prior to said effective dates the southern carriers themselves and also the southern coke shippers filed protests with the Commission against the aforesaid notices of revocation of unrestricted concurrences and the aforesaid proposed new restricted concurrences. By orders dated April 30, 1934, and July 30, 1934, the Commission suspended the schedules, containing said joint rates and said revocations and concurrences, and

entered upon an investigation concerning their lawfulness under the Interstate Commerce Act. This proceeding was designated as Investigation and Suspension Docket No. 3985.

11. Hearing in said proceeding was held at Louisville, Ky., on September 11, 12, 13, and 14, 1934, at which voluminous evidence was introduced, consisting of oral testimony of witnesses, and numerous documentary exhibits, on behalf of respondents, including plaintiffs herein, and other parties to said proceeding, including intervening plaintiffs and intervening defendants herein.

12. On March 11, 1935, the Commission issued its first report in said proceeding, entitled Coke from Alabama and Tennessee to Central Territory, published in 208 I. C. C. 281, in which it found, among other things, that joint rates from southern territory to Central territory made by applying the aforesaid Column 2 scale from origins to destinations and adding thereto certain ar-itraries for hauls in southern territory, were and for the future would be maxi-
[fol. 180] mum reasonable rates. It further found that the suspended schedules had not been justified, and by order of March 11, 1935, required the respondents to cancel said schedules. The bill of complaint herein seeks also to enjoin, set aside, suspend, and annul this order of March 11, 1935.

13. On March 20 and 28, 1936, the southern coke shippers filed petitions with the Commission requesting reconsideration of its decision and order of March 11, 1935. Replies to these petitions were filed by the central territory carriers and coke shippers on April 7, 1936. Plaintiffs herein, as respondents in said proceeding before the Commission, in their replies to said petition for reconsideration, made no suggestion that the evidence introduced at the aforesaid hearing did not fully disclose all the relevant facts and circumstances and made no request that they be granted leave to submit further evidence. By order of April 15, 1936, the Commission reopened said proceeding for reconsideration on the record as it then stood.

14. On April 30, 1936, the Commission issued its aforesaid report on reconsideration, 215 I. C. C. 384, in which it affirmed the finding that the suspended schedules had not been justified, and further found that the carload rates on

coke from the Birmingham district, Chattanooga, and Wise County, Va., to destinations in central territory for the future would be unreasonable to the extent that they exceeded rates based on the distance scale set forth in said report and reproduced above in finding No. 3, which are the same as the aforesaid Column 2 scale rates for the same distances. Said report and order of April 30, 1936, vacated and set aside previous orders to the extent that they required the establishment and maintenance of higher coke rates from and to the same points.

15. Plaintiffs herein, as respondents before the Commission in said investigation and Suspension Docket No. 3985, filed no petition or other request for rehearing or reconsideration of the decision and order of April 30, 1936, in said proceeding.

[fol. 181] 16. The carriers respondent in Investigation and Suspension Docket No. 3985, after the issuance of the original report and order therein, 208 I. C. C. 281, of March 11, 1935, filed tariffs with the Commission in purported compliance therewith, but said proceeding was reopened for reconsideration before said rates became effective, and the Commission suspended them, by order dated April 30, 1936, designated Investigation and Suspension Docket No. 4198. Said suspended rates were canceled by the tariffs establishing the rates prescribed by said order of April 30, 1936, in Investigation and Suspension Docket No. 3985, and no further report or order was issued in said Investigation and Suspension Docket No. 4198. The bill of complaint herein also seeks to enjoin, set aside, suspend, and annul said order of April 30, 1936, in Investigation and Suspension Docket No. 4198.

17. In said report of April 30, 1936, 215 I. C. C. 384, the Commission found that the coke rates applying within southern territory, voluntarily established and maintained by the southern carriers, from Chattanooga, Birmingham, and Wise County, Va., were in certain instances slightly higher, and in other lower, than they would be if made strictly on the Column 2 basis, but that they averaged about the same, and that from Chattanooga and Birmingham combined to all destinations having a population of 5,000 or more, the rates averaged $2.96 per ton, which is also the average under the Column 2 scale.

18. In said report of April 30, 1936, the Commission further found that the southern producers of coke were able to sell in central territory only to a limited extent on the rates then in effect; that the southern carriers were convinced that any rates higher than the Column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues; that the unrebutted evidence of the Chattanooga and Birmingham producers was to the same effect.

[fol. 182] 19. In said report of April 30, 1936, the Commission affirmed the conclusion reached in its earlier report of March 11, 1935, that the contention of the coke producers and carriers in central territory that the establishment of rates from the South on the Column 2 basis would be unduly preferential, was without merit.

20. In said report of April 30, 1936, the Commission further found that coke is shipped only from the Birmingham district, Chattanooga, and stations on the Louisville & Nashville and Interstate Railroads in Wise County, Va., to central territory over the main lines of carriers reaching the Ohio River, and that all traffic from the South to central territory and the northwest moves over those lines; that the revenue net tons per mile of road transported by the Cincinnati, New Orleans & Texas Pacific Railway Company, which terminates at Chattanooga and Cincinnati, exceed that handled by such carriers as the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, New York Central Railroad Company, and the Wabash Railroad Company, and the average handled by all lines operating in central territory, even when those which extend into western trunk line, southwestern, and southern territories are excepted.

21. In said report of April 30, 1936, the Commission further found that too much weight was given in the prior report to the absence of specific data as to traffic density over routes from Birmingham, and not enough to the established rate adjustment in southern and central territories, and the effect rates have on the interterritorial movement of the traffic; that coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory (the territory east of the Mississippi River and north of the Ohio River and the line

of the Norfolk & Western Railway to Norfolk, Va.); that the Commission had frequently recognized that the transportation burden is differently distributed in official and southern territories and that, on some commodities, rates may justly be relatively lower in the South than in official [fol. 183] territory; that it had also, in several cases where competitive conditions are somewhat analogous to those here indicated, prescribed rates from origins in western trunk line and southern territories to official territory on the basis of the scales that apply in official territory.

22. In said report of April 30, 1936, the Commission further found that the producers of coke in official territory have no just ground for complaint against interterritorial rates from the South to central territory on the same level, mile for mile, as those they pay; that if interterritorial rates higher than Column 2 rates were warranted, as the central carriers contended, because of more difficult operating conditions in the South it would be proper that the increment accrue solely to the southern carriers; that the carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by the prescription of the Column 2 rates.

23. In said report of April 30, 1936, the Commission further found that rates on coke from the South to points in central territory, on the basis of the rates therein prescribed, will not be unduly prejudicial to shippers of coke within central territory or unduly preferential of southern shippers.

AS CONCLUSIONS OF LAW

the Court finds:

1. That the evidence supports the findings of the Commission, and in making its orders the Commission did not exceed its authority, and said findings support its conclusions and its order of April 30, 1936, prescribing maximum reasonable rates for the transportation in question.

2. The Commission's conclusion that the rates prescribed in the order of April 30, 1936 for future application will be maximum reasonable rates, is supported by evidence.

[fols. 184-185] 3. The Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial

to shippers of coke within central and Illinois territories or unduly preferential of southern shippers, is supported by the evidence.

4. The Commission properly gave consideration to the effect of rates upon the movement of traffic.

5. The Commission's conclusion that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, distance considered, than the rates applying in either territory through which said interterritorial traffic passed.

6. Said order of April 30, 1936, is valid.

7. This Court is not required to pass upon the validity of the Commission's order of March 11, 1935.

8. The order of April 30, 1936, in Investigation and Suspension Docket No. 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.

9. The bill of complaint should be dismissed for want of equity at plaintiffs' costs.

Plaintiffs are allowed an exception for the findings proposed and not adopted and for the proposed conclusions which are rejected.

Evan A. Evans, Circuit Judge. Charles E. Woodward, District Judge. John P. Barnes, District Judge.

January 20, 1937.

[fol. 186] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 21, 1937

FINDINGS OF FACT

1. The plaintiffs are 19 common carriers by railroad, engaged in the transportation in interstate commerce of vari-

ous commodities, including coke, within Central Freight Association and Illinois territories, and, under joint rates with southern carriers, from points in Alabama, Tennessee, and Virginia to destinations in the States of Illinois, Indiana, Ohio and Michigan, hereinafter referred to as central territory. The intervening plaintiffs are the Citizens Gas & Coke Utility, Indiana Gas & Chemical Corporation, Interlake Iron Corporation, the Laclede Gas Light Company, the Milwaukee Coke & Gas Company, and North Shore Coke & Chemical Company, engaged in the production and shipment in interstate commerce of coke from various producing points in central territory.

2. The defendants named in the bill are the United States of America and the Interstate Commerce Commission. The intervening defendants are the Alabama Iron & Steel Shippers Conference and the Tennessee Products Corporation [fol. 187] in behalf of southern coke shippers and the Louisville & Nashville Railroad Company and other southern carriers participating in the transportation of coke from points of origin in southern territory to points of destination in central territory.

3. By bill of complaint filed July 22, 1936, plaintiffs seek to enjoin, set aside, suspend and annul an order of the Interstate Commerce Commission made and entered April 30, 1936, in a proceeding entitled Coke from Alabama and Tennessee to Central Territory, Investigation and Suspension Docket No. 3985; also an earlier order in said proceeding which was vacated and set aside by said order of April 30, 1936, and also a suspension order in Investigation and Suspension Docket No. 4198, hereinafter referred to more particularly.

4. Answers to said bill of complaint were duly filed by the United States and the Interstate Commerce Commission and also by the intervening defendants.

5. Hearing upon said bill of complaint was held at Chicago, Ill., October 15, 1936, before this Court, specially constituted of three judges, Circuit Judge Evans and District Judges Barnes and Woodward, as required by the Urgent Deficiencies Act, under which this suit is brought. It was stipulated and agreed by counsel for all parties that said hearing should be deemed to be the final hearing in this cause.

6. At said hearing there was introduced a certified copy of the evidence introduced and oral argument before the Interstate Commerce Commission at the hearing held by it in said proceeding entitled Coke from Alabama and Tennessee to Central Territory, Investigation and Suspension Docket No. 3985. There was also introduced in evidence a copy of the Commission's decision in its Investigation and [fol. 188] Suspension Docket No. 3511, Coke between Points in Central and Illinois Territories, 194 I. C. C. 640, dated June 30, 1933; its decisions in Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, 208 I. C. C. 281, dated March 11, 1935, and 215 I. C. C. 384, dated April 30, 1936; a letter from the southern railroads addressed to the central territory carriers asking them to enter into negotiations with the southern lines for dividing the rates on coke from the southern producing points prescribed by the Commission in its order of April 30, 1936, and copies of petitions filed by the Southern coke manufacturers in March, 1936, as a result of which the Commission entered its said order of April 30, 1936 without a hearing.

7. In a proceeding entitled Coke between Points in Central and Illinois Territories, Investigation and Suspension Docket No. 3511, the Commission, by report and order dated June 30, 1933, 194 I. C. C. 640, prescribed a scale of distance rates as maximum reasonable rates for application within central territory, hereinafter referred to as the Column 2 scale. In said report and order the Commission also prescribed a scale of distance rates as maximum reasonable rates for application interterritorially from four points of origin in southern territory, viz., Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to points of destination in central territory, hereinafter referred to as the Column 3 scale. The Column 3 scale was approximately 10% higher than the Column 2 scale. Said order of June 30, 1933, required that said Column 2 and Column 3 scales be established and made effective on or before September 15, 1933. By subsequent orders this effective date was extended to March 15, 1934.

[fol. 189] 8. The central territory carriers established said Column 2 scale within central territory, effective March 15, 1934.

9. The southern territory carriers, who publish for account of all participating railroads the interterritorial rates on coke from the South to points north of the Ohio River, reduced to the basis of the Column 3 scale, effective March 15, 1934, those inter-ritorial joint rates from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to points of destination in Central territory which were higher than the Column 3 scale, but did not increase any of said interterritorial rates that were then lower than the Column 3 scale. These joint rates, lower than the basis prescribed by the Commission, were applicable over the lines of both southern and central territory carriers, having been published by the southern carriers under concurrences, previously issued by the central territory carriers and filed with the Commission.

10. Because of the failure of the publishing lines to establish the basis of rates prescribed by the Commission for interterritorial application the same as had been done by the central territory lines in respect of the rates within their own territory, the central territory carriers thereafter filed with the Commission certain schedules, proposed to become effective May 1, 1934, on thirty days' notice, containing notices of revocation of their concurrences in joint rates from southern territory to central territory, and new concurrences authorizing such joint rates only on basis of the Column 3 scale prescribed by the Commission in Investigation and Suspension Docket No. 3511. In view of these proposed restricted concurrences, the southern carriers published and filed with the Commission tariff schedules, proposed to become effective May 1 and August 3, 1934, on [fol. 190] thirty days' notice, naming new joint rates on coke on basis of the Column 3 scale from points in the Birmingham, Ala., district, from Chattanooga, and from points in Wise County, Va., to destinations on the lines of the central territory carriers. From Birmingham district and from points in Wise County, Va., the joint rates so published were increases, while those from Chattanooga were increases in some instances and reductions in others, but in no instance would the resulting rates have exceeded those prescribed by the Commission. Prior to said effective dates the southern carriers themselves and also the southern coke shippers filed protests with the Commission against said newly filed joint rates published on the basis prescribed by the Commission as reasonable maxima in Investigation and Suspension

Docket No. 3511 and also against the aforesaid notices of revocation of unrestricted concurrences. By orders dated April 30, 1934, and July 30, 1934, the Commission suspended the schedules, containing said joint rates and said revocations and concurrences, and entered upon an investigation concerning their lawfulness under the Interstate Commerce Act. This proceeding was designated as Investigation and Suspension Docket No. 3985.

11. Hearing in said proceeding was held at Louisville, Ky., on September 11, 12, 13, and 14, 1934, at which evidence was introduced, consisting of oral testimony of witnesses, and documentary exhibits, on behalf of respondents, including plaintiffs herein, and other parties to said proceeding, including intervening plaintiffs and intervening defendants herein.

12. On March 11, 1935, the Commission issued its first report in said proceeding, entitled Coke from Alabama and Tennessee to Central Territory, published in 208 I. C. C. 281, in which it found, among other things, that joint rates [fol. 191] from southern territory to central territory made by applying the aforesaid Column 2 scale from origins to destinations and adding thereto certain arbitraries for hauls in southern territory, were and for the future would be maximum reasonable rates. It further found that the suspended schedules had not been justified, and by order of March 11, 1935, required the respondents to cancel said schedules. The bill of complaint herein seeks also to enjoin, set aside, suspend, and annul this order of March 11, 1935.

13. On March 20 and 28, 1936, the southern coke shippers filed petitions with the Commission requesting reconsideration of its decision and order of March 11, 1935. Replies to these petitions were filed by the central territory carriers and coke shippers on April 7, 1936. Plaintiffs herein, as respondents in said proceeding before the Commission, in their replies to said petition for reconsideration pointed out that the statements and contentions of petitioners therein were wholly unfounded and without any legal or equitable basis, and accordingly prayed that the said petitions be denied. Nevertheless, by order of April 15, 1936, the Commission reopened said proceeding for reconsideration on the record as it then stood.

14. On April 30, 1936, the Commission issued its aforesaid report on reconsideration, 215 I. C. C. 384, in which it affirmed the finding that the suspended schedules had not been justified, and further found that the carload rates on coke from the Birmingham district, Chattanooga, and Wise County, Va., to destinations in central territory for the future would be unreasonable to the extent that they exceeded rates based on the distance scale set forth in said report and reproduced above in finding No. 3, which are the [fol. 192] same as the aforesaid Column 2 scale rates for the same distances. Said report and order of April 30, 1936, vacated and set aside previous orders to the extent that they required the establishment and maintenance of higher coke rates from and to the same points.

15. The distance scale of rates prescribed by the Commission in its decisions of June 30, 1933, and April 30, 1936, as aforesaid, for points to destinations in central territory were as follows:

Distance		Rates Under I. & S. Docket 3511 June 30, 1933	Rates Under I. & S. Docket 3985 April 30, 1936
		Cents	Cents
160 miles and over	140.....	230	215
180 miles and over	160.....	245	225
200 miles and over	180.....	260	235
220 miles and over	200.....	270	245
240 miles and over	220.....	280	255
260 miles and over	240.....	290	265
280 miles and over	260.....	305	275
300 miles and over	280.....	315	285
320 miles and over	300.....	325	295
340 miles and over	320.....	335	305
360 miles and over	340.....	345	315
380 miles and over	360.....	360	325
400 miles and over	380.....	370	335
425 miles and over	400.....	380	345
450 miles and over	425.....	390	355
475 miles and over	450.....	400	365
500 miles and over	475.....	415	375
530 miles and over	500.....	425	385
560 miles and over	530.....	435	395
590 miles and over	560.....	445	405
620 miles and over	590.....	455	415
650 miles and over	620.....	470	425
680 miles and over	650.....	480	435

Distance		Rates Under I. & S. Docket 3511 June 30, 1933	Rates Under I. & S. Docket 3985 April 30, 1936
		Cents	Cents
710 miles and over	680	490	445
740 miles and over	710	500	455
770 miles and over	740	510	465
800 miles and over	770	520	475
830 miles and over	800	530	485
860 miles and over	830	540	495
890 miles and over	860	550	505
920 miles and over	890	560	515
950 miles and over	920	570	525
980 miles and over	950	580	535
1,010 miles and over	980	590	545
1,050 miles and over	1,010	605	555

[fol. 193] The order of the Commission in Investigation and Suspension Docket No. 3985, dated March 11, 1935, prescribed a basis of rates from Southern origins to central territory destinations to be made by adding to the central territory column 2 distance scale certain mileage arbitraries according to the length of the haul in southern territory. These arbitraries ranging from 10 cents for 20 miles and under up to 39 cents for 560 miles and over 530 miles added to the base rate would have resulted in joint through rates from Southern producing points to central territory destinations approximately 107½ per cent of the column 2 scale prescribed for application within central territory.

16. With said order of April 30, 1936, and as part thereof, the Commission issued a report, being the "Report of the Commission on Reconsideration", published in 215 I. C. C. 384.

17. The rates prescribed in said order of April 30, 1936, were established and made effective August 13, 1936, as required by said order, and said rates are now in force.

18. The basis of rates established in compliance with the Commission's said order of April 30, 1936, is the third successively lower basis of rates prescribed in this proceeding within the three years preceding its issuance. In each of the three reports and orders hereinbefore described the Commission prescribed the basis of rates set out in the report as reasonable maximum rates. None of the rates prescribed was ever permitted to become effective, but the

schedule published to become effective in conformity with the Commission's order was in each instance suspended and *and* later followed by a report and order finding a different and lower basis of rates proper and lawful and requiring [fol. 194] plaintiffs and others to publish the same. The rates prescribed by the Commission, in its third successive order, dated April 30, 1936, are materially lower than those prayed for by the petitioners before the Commission, and are materially lower than the basis which the said petitioners before the Commission represented as a maximum reasonable basis of rates. The basis of rates prescribed by the Commission in its said orders is less than the reasonable maximum basis of rates which the Commission has the lawful power or authority to prescribe.

19. The record before the Commission in Investigation and Suspension Docket No. 3985 showed, it was conceded by witnesses for southern interests, that the rates prescribed by the Commission in Investigation and Suspension Docket No. 3511 did not exceed reasonable maxima.

20. On oral argument before the Commission in Investigation & Suspension Docket No. 3985, it was not contended or claimed by either southern producers or carriers that the rates prescribed in Investigation & Suspension Docket No. 3511 were unreasonable in their application to shipments of coke from southern origins to destinations in central territory, or that they exceeded maximum reasonable rates.

21. The reports and orders of the Commission in Investigation and Suspension Docket No. 3985 also went beyond the scope of the issues in that proceeding, in that they required changes in rates which were not involved therein. Not only did the Commission pass upon rates named in the schedules under suspension, but also ordered reductions in rates that had been published and made effective by the southern carriers in purported compliance with the Com- [fol. 195] mission's decision in Investigation and Suspension Docket No. 3511, which were clearly not involved in Investigation and Suspension Docket No. 3985.

22. There was no substantial evidence before the Commission showing or tending to show that joint through interterritorial coke rates in connection with the southern railroads, on the same basis as is applicable within central

territory would yield to the central territory carriers, the maximum reasonable compensation for the services they perform in the transportation of coke from the point of connection or junction with the southern carriers, or the same measure of compensation as they receive on coke transported by them between points in central territory. The evidence further shows that there has been no understanding or agreement as between the central territory lines, on the one hand, and the southern carriers, on the other, as to the divisions to be received by either or both of them out of the rates fixed by the Commission in Investigation and Suspension Docket No. 3985.

23. The coke rates applying within southern territory are made on no regular or defined basis, and in no instance have the rates in that territory ever been prescribed or passed upon by the Commission to determine what the reasonable maximum level should be. In some instances the present rates within southern territory are higher, and in others lower, than the column 2 basis applying within central territory. There is no evidence showing or tending to show that rates on coke within southern territory are reasonable maximum, no evidence showing or tending to show the circumstances and conditions under which any of the rates within southern territory came to be established.

[fol. 196] 24. The Cincinnati, New Orleans and Texas Pacific Railway Company, a part of the Southern Railway System, transports only a very insignificant coke tonnage, the total originated for the year 1932 amounting to only 414 tons and the total received from all connecting railroads between all points and in all directions only 2324 tons.

25. The Pittsburgh & Lake Erie Railroad Company, a part of the New York Central Railroad System, which operates wholly within central territory, has a traffic density more than twice that of the Cincinnati, New Orleans & Texas Pacific Railway Company, the figures for the two roads being 4,927,876 and 2,445,223 tons per mile of road, respectively.

26. The traffic density of central territory lines exceeds that in southern territory per mile of road by more than 100 per cent. In dealing with interterritorial rates the comparison of traffic densities is with all roads in each district rather than a selected railroad or part of one railroad sys-

tem in one territory and all railroad systems operating, wholly or in part, in the other territory.

27. In the record before the Commission in Investigation and Suspension Docket No. 3985 it was conceded by witnesses for southern interests, that the rates prescribed by the Commission in Investigation and Suspension Docket No. 3511 did not exceed reasonable maxima.

28. On oral argument before the Commission in Investigation and Suspension Docket No. 3985 there was no contention that the rates prescribed in Investigation and Suspension Docket No. 3511 were unreasonable in their application to shipments of coke from southern origins to destinations in central territory, or that they exceeded maximum reasonable rates.

[fol. 197] 29. The basis of rates established in compliance with the Commission's said order of April 30, 1936, is the third successively lower basis of rates prescribed in this proceeding within the three years preceding its issuance. In each of the three reports and orders hereinbefore described the Commission fixed the basis of rates set out in the report as reasonable maximum rates. None of the rates prescribed was ever permitted to take effect, but the schedule published to become effective in conformity with the Commission's order was in each instance suspended and later followed by a report and order finding a different and lower basis of rates proper and lawful and requiring plaintiffs and others to publish the same. The rates prescribed by the Commission, in its third successive order, dated April 30, 1936, are materially lower than those prayed for by the petitioners before the Commission, and are materially lower than the basis which the said petitioners before the Commission represented as a maximum reasonable basis of rates. The basis of rates prescribed by the Commission in its said orders is less than the reasonable maximum basis of rates which the Commission has the lawful power or authority to prescribe.

30. The rates required by the orders of the Commission complained of are unreasonably low and will not afford maximum reasonable compensation to the carriers transporting coke from southern origins to destinations in central territory.

31. The rates which the Commission required the carriers to establish from southern origins to points in central territory result in undue prejudice to shippers of coke within central territory who pay maximum reasonable rates prescribed by the Commission in Investigation and Suspension [fol. 198] Docket No. 3511 and undue preference of southern shippers who are favored in the orders complained-of with rates materially lower than those fixed by the Commission in the same case for interterritorial application.

[fol. 199] CONCLUSIONS OF LAW

Upon the foregoing facts the Court is requested to make the following conclusions of law.

The two successive orders of the Commission, the first dated March 11, 1935, issued in Investigation and Suspension Docket No. 3985, and the second, dated April 30th, 1936, in the same proceeding, each of which required plaintiffs to publish and charge lower rates than those which the Commission had previously, in its order of June 30, 1933, found in a comprehensive proceeding known as Investigation and Suspension Docket No. 3511, to be just and reasonable rates, and had required plaintiffs to publish and charge, are unlawful and void because the Court find them to be beyond the Commission's power and authority for the various reasons following:

1. The rates prescribed in said orders and which plaintiffs are required to publish and maintain are below reasonable maximum rates, and the Commission is without lawful power to require plaintiffs to maintain and charge, against their will, rates which are lower than reasonable maxima.

2. The order of April 30, 1936, which prescribed and required plaintiffs to publish and maintain and charge the third successively lower basis of rates without having taken or heard any evidence or facts, but was made solely on petitions, or pleadings, amounted in legal effect to no hearing. An order can be lawfully made by the Commission only after full hearing. The action of the Commission in making the order without hearing was arbitrary and unlawful.

3. An order of the Commission to be lawful and enforcible must be supported by findings of the basic facts on which it was made and the lack of such findings invalidates the [fol. 200] order. Both orders requiring the establishment

of lower rates are made on findings that the supplanted rates are unreasonable, and the substituted rates will be reasonable. To satisfy the requirement of the law said orders must have been supported by basic findings that the rates prescribed are reasonable maxima.

4. Certain rates were prescribed by the Commission and ordered in the original order dated June 30, 1933, Investigation and Suspension Docket No. 3511. In each of the two subsequent orders the Commission found the rates prescribed in the former unreasonable. But there is no finding to show that a change in circumstances or conditions made the previously prescribed rates unreasonable at the time of subsequent order. The conclusion of unreasonableness in each of the orders referred to is insufficient as a finding to support the order.

5. The rates prescribed by the Commission on coke from the South to the North, and which plaintiffs are required against their will to join the southern lines in maintaining and charging, were prescribed by the Commission to enable the southern producers of coke to better compete with the producers in the North, and are not reasonable maxima. The Commission is without lawful power or authority to compel plaintiffs to join the southern carriers in rates made lower than reasonable maxima, for competitive reasons.

6. The rates in the North applicable on coke moving within the North were published and are maintained by plaintiffs pursuant to the order of the Commission of June 30, 1933, heretofore referred to—which rates the Commission prescribed (maxima). By requiring plaintiffs to charge shippers in the North reasonable maximum rates and compelling plaintiffs to join the southern carriers in rates from the South to the North less than reasonable maxima, would require plaintiffs to engage in a prejudicial and preferential practice which is unlawful.

[fol. 201] 7. The rates prescribed in the orders referred to which are challenged by plaintiffs, are based or fixed with consideration to competitive conditions between shippers and railroads in the South on the one hand and shippers and railroads in the North on the other hand, transportation conditions having been practically ignored. Such action is beyond the lawful powers of the Commission.

8. The indisputable evidence shows that transportation conditions applicable to joint through rates on coke from the South to the North are more onerous than apply in the North. Reasonable maximum rates on coke from the South to the North therefore must be higher than are applicable within the North.

9. The Commission is not bound by law to fix rates on any precise or exact mathematical formula, but during its many years of administering the Interstate Commerce Act having employed certain well known and recognized standards for testing and prescribing reasonable maximum rates, it was arbitrary action to disregard those standards, in fact it tested and fixed the rates on coke from the South to the North on a standard or a basis contrary to those usually employed.

10. The rates fixed by the Commission on coke from the South to the North tend to equalize disadvantages of geographical location, opportunities or abilities which is beyond the lawful powers of the Commission to do.

11. The rates ordered by the Commission are below reasonable maximum rates.

12. There is no substantial evidence before the Commission to support its conclusion that the prescribed rates are reasonable maximum rates.

13. The indisputable character of the evidence before the Commission establishes that rates fixed and ordered are less [fols. 202-203] than reasonable maximum rates.

14. That the rates applicable to transportation of coke in the North are subnormal rates, as are the rates voluntarily maintained by the southern carriers within the South, and neither basis is lawful criterion for fixing maximum reasonable rates from the South to the North.

15. The orders are void since they are without support in the evidence and are contrary to the evidence.

16. The Court therefore holds that the orders of the Commission heretofore referred to prescribing levels of rates on coke from the South to the North, are unlawful and void, and are set aside, annulled and suspended, and their enforcement permanently enjoined and restrained.

17. Rates fixed by the Commission in its order of April 30, 1936, in Investigation and Suspension Docket No. 3985 were made on the erroneous assumption that the share of the plaintiffs out of the joint through rates prescribed would be equivalent to the earnings they would receive for the transportation of coke within their own territory for like distances on the same level of rates. There was no evidence to support such an assumption on the part of the Commission.

18. The action of the Commission in suspending in its Investigation and Suspension Docket No. 4198 the tariffs naming rates on coke from southern manufacturing points to destinations in central territory and not the concurrences of central territory carriers providing for rates on the maximum reasonable basis previously prescribed by the Commission created a conflict between tariffs and concurrences which deprived the railroads in central territory of their right to reasonable compensation based on the reasonable and remunerative joint through rates so prescribed by the Commission for which concurrences were in effect.

—— ——, Circuit Judge. —— ——, District Judge.
—— ——, District Judge.

December —, 1936.

[fol. 204] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS OF BEHALF OF DEFENDANTS TO PLAINTIFFS' REQUESTED FINDINGS OF FACT—Filed January 21, 1937

Plaintiffs' requested findings Nos. 1, 2, 3, 4 and 5 are identical with our requested findings of the same numbers.

Plaintiffs' requested finding No. 6 undertakes to specify all of the evidence introduced at the hearing before the Court, whereas our requested finding No. 6 merely mentioned that there was introduced at said hearing a certified copy of the evidence before the Commission. We do not think it is necessary that the finding specify all the evidence that was introduced and that it is sufficient if it finds the important fact that a certified copy of the evidence introduced at the Commission hearing was put before the

Court. We are willing that our requested finding No. 6 be amended by inserting after the words "at said hearing there was introduced" the words "among other things." The last clause of plaintiffs' requested finding No. 6 reading—

"and copies of petitions filed by the southern coke manufacturers in March, 1936, as a result of which the Commission entered its said order of April 30, 1936 without a hearing"

[fol. 205] is highly objectionable because it says the order was made without a hearing, which is not true. See our requested finding No. 16 and our requested conclusion of law No. 2. See also paragraph No. VI of our answer. We would have no objection to a revision of the above-quoted language as follows:

"and copies of petitions filed with the Commission by the southern coke shippers on March 20 and 28, 1936, requesting reconsideration of its decision and order of March 11, 1935."

Plaintiffs' requested findings Nos. 7 and 8 are identical with our Nos. 10 and 11.

Plaintiffs' requested finding No. 9 is similar in substance to our No. 11 and we have no particular objection thereto, although we prefer the language of our requested finding.

Plaintiffs' requested finding No. 10 is objectionable because it says erroneously that the publishing (southern) lines failed to establish the basis of rates prescribed by the Commission. The prescribed rates referred to were not specific rates nor were they minimum rates but were maximum rates and the southern lines were not required to establish rates at the full maximum but were within their rights in establishing or continuing rates which were lower than the maximum prescribed. Moreover, the wording of plaintiffs' requested finding indicates unanimity of action by the central carriers, which is not so. Not all of the central territory carriers revoked their concurrences. It is a fact, which plaintiffs do not deny, that many of the important central territory lines did not cancel their concurrences, including Illinois Central, the Chicago, Burlington & Quincy and others, and it was so found in the Commission's report. Plaintiffs' requested finding No. 10

would supplant our No. 13. Our No. 13 is accurate and should be adopted in preference to their No. 10. (See par. V, pages 4 and 5, of the Commission's answer to the bill of complaint.)

[fol. 206] Plaintiffs' finding No. 11 is similar to our No. 14; in fact it is identical except for the omission of two adjectives, viz., "voluminous" before evidence and "numerous" before documentary. We have no particular objection to the revised version except that we would prefer that the word "substantial" be inserted before the word evidence.

Plaintiffs' requested finding No. 12 is identical with our No. 15.

Plaintiffs' requested finding No. 13 is objectionable because it omits the important fact that the replies filed by the central territory carriers and coke shippers to the petition of the southern coke shippers for reconsideration of the Commission's decision contained no request that they be granted leave to submit further evidence. This finding should be rejected and instead our No. 16 should be adopted.

Plaintiffs' requested finding No. 14 is identical with our No. 17.

Plaintiffs' requested finding No. 15 appears to be accurate and we have no particular objection thereto except that it sets out unnecessarily and at considerable length what was required by an earlier order which was withdrawn and vacated by the subsequent order of April 30, 1936. We suggest that this finding be rejected and that instead our findings Nos. 7 and 17 should be adopted. Our finding No. 17 through error refers to the scale of rates reproduced in our finding No. 3, whereas it should have referred to finding No. 7.

Plaintiffs' requested findings Nos. 16 and 17 are identical with our Nos. 8 and 9, respectively.

[fol. 207] Plaintiffs' requested finding No. 18 should be rejected because it is inaccurate in many respects, because in other respects it sets out alleged matter which is irrelevant and without legal significance upon the question of the validity of the Commission order, and finally because it says in substance that the Commission's order is invalid, whereas the Court finds to the contrary. This requested finding is largely a repetition of the allegations of paragraph VI of the bill of complaint. See paragraph VI of the Commission's answer.

Plaintiffs' requested finding No. 19 is objectionable because it is inaccurate and because its statements, even if true, are without legal significance, since the Commission found upon the evidence as a whole that the rates it prescribed in its order of April 30, 1936, were just and reasonable and that any higher rates would be unjust and unreasonable.

Plaintiffs' requested finding No. 20 is objectionable for the same reasons as stated above concerning their No. 19.

Plaintiffs' requested finding No. 21 should be rejected because it is inaccurate and further because it goes beyond the allegations of the bill of complaint, there being no allegation therein that the Commission dealt with rates that were not in issue.

Plaintiffs' requested finding No. 22 is objectionable because it relates to the matter of divisions of joint rates which were not in issue and not decided by the Commission. If the northern and southern carriers are unable to agree upon the divisions of the joint rates in question the way is open to them under the provisions of section 15(6) of the Interstate Commerce Act to secure a determination of the reasonableness of the divisions by the Commission. See page 11 of the Commission's answer to the bill of complaint. [fol. 208] Plaintiffs' requested finding No. 23 should be rejected because it is irrelevant and immaterial. The important relevant facts are set out in our requested finding No. 20, which should be considered in connection with our requested finding No. 10 and our requested conclusions of law Nos. 6 and 8.

Plaintiffs' requested findings Nos. 24, 25 and 26 relate to the question of traffic density. The facts stated therein, if true, are immaterial and misleading. The important facts in this connection, which were found in the Commission's report of April 30, 1936, and which are supported by substantial evidence, are set forth in our requested findings Nos. 23 and 24.

Plaintiffs' requested finding No. 27 is a mere repetition of their requested finding No. 19 and should be rejected for the reasons stated above.

Plaintiffs' requested finding No. 28 appears to be a garbled repetition of their requested finding No. 20, and should be rejected for the reasons stated above.

Plaintiffs' requested finding No. 29 is a word for word repetition of their requested finding No. 18, and should be rejected for the reasons stated above.

Plaintiffs' requested finding No. 30 should be rejected because it is directly contrary to the Commission's ultimate finding, based upon the evidence and furnishing the support for the order which the Court has found to be valid.

Plaintiffs' requested finding No. 31 should be rejected because it asks the Court to find undue prejudice, whereas the Commission found there would be no undue prejudice, its finding in this regard being supported by substantial evidence. See our requested findings Nos. 22 and 26 and our requested conclusions of law Nos. 3 and 5.

[fols. 209-210] J. Stanley Payne, Assistant Chief Counsel, Interstate Commerce Commission. Elmer B. Collins, Special Assistant to the Attorney General of the United States. J. V. Norman, Counsel for Alabama Iron & Steel Shippers et al. W. A. Northcutt, Counsel for Louisville & Nashville Railroad Company et al.

Washington, D. C., January 9, 1937.

[fols. 211-212] In United States District Court for the Northern District of Illinois, Eastern Division

Equity No. 15266

The Baltimore and Ohio Railroad Company et al., Plaintiffs,

vs.

United States of America, Interstate Commerce Commission, et al., Defendants

Decree—January 21, 1937

The above entitled cause coming on to be heard and the parties having introduced their evidence and the court having heard counsel and having made findings of fact and conclusions of law which are on file.

It is Ordered, Adjudged, and Decreed that the plaintiffs' complaint be and it is hereby dismissed.

It is Further Ordered, Adjudged, and Decreed that the defendants recover their costs of the plaintiffs, to be taxed and inserted herein at Thirty-seven ($37.00) Dollars by the Clerk.

Dated January 21, 1937.

Evan A. Evans, Circuit Judge. Charles E. Woodward, District Judge. John P. Barnes, District Judge.

[fol. 213] In United States District Court

[Title omitted]

Notice of Appeal—Filed March 17, 1937

To Elmer B. Collins, Solicitor for the United States of America; J. Stanley Payne, Solicitor for the Interstate Commerce Commission; W. A. Northcutt, Solicitor for the intervening Southern Railroads; J. B. Norman, Solicitor for intervening Southern Shippers; A. B. Cronk, Solicitor for certain intervening Northern Shippers; H. I. Allen and Adolph J. Radosta, Jr., Solicitors for certain intervening Northern Shippers:

You and each of you are hereby notified that on the 17th day of March, 1937, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, we shall present to the Honorable Evan A. Evans, United States Circuit Judge, and the Honorable Charles E. Woodward and Honorable John P. Barnes, United States District Judges, the petition of the Petitioners herein for an appeal from the final order or decree made and entered in the District Court in the above-entitled cause on the 21st day of January, 1937, to the Su- [fols. 214-216] preme Court of the United States, a copy of said petition for appeal and assignment of errors therein referred to being attached hereto; and ask that an order be entered herein allowing said appeal and making the same returnable within thirty (30) days from March 17th, 1937, a copy of said order being also attached hereto.

Anthony P. Donadio, Jervis Langdon, Jr., Guernsey Orcutt, Marion B. Pierce, Leo P. Day, Solicitors for Petitioners.

Received a copy of the foregoing notice, together with a copy of the petition for appeal, assignment of errors and order therein referred to, this — day of March, 1937.

—— ——, Solicitor for United States of America. —— ——, Solicitor for Interstate Commerce Commission. —— ——, Solicitor for intervening Southern Railroads. —— ——, Solicitor for intervening Southern Shippers. —— ——, —— ——, Solicitors for intervening Northern Shippers.

[fol. 217] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 17, 1937

To Honorable Evan A. Evans, United States Circuit Judge; Honorable Charles E. Woodward, Honorable John P. Barnes, United States District Judges:

Now come the Baltimore and Ohio Railroad Company, Central Indiana Railway Company, The Chesapeake and Ohio Railway Company, Chicago & Erie Railroad Company, Chicago, Indianapolis & Louisville Railway Company, H. R. Kurrie and Homan D. Pettibone, Trustees, Detroit, Toledo & Ironton Railroad Company, Erie Railroad Company, Grand Trunk Western Railway, The New York Central Railroad Company, The New York, Chicago & St. Louis Railroad Company, Norfolk & Western Railway Company, H. B. Stewart and William L. Day, Trustees, Northern Ohio Railway Company and Akron, Canton & Youngstown Railway Company, The Pennsylvania Railroad, Pere Marquette Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company and The Ann Arbor Railroad Company, and The Wheeling and Lake Erie Railway Company, petitioners herein, by their solicitors, and feeling aggrieved by the final order or decree of the District Court made and entered herein on towit, [fols. 218-219] January 21, 1937, do hereby appeal therefrom to the Supreme Court of the United States, and pray that their appeal be allowed and that citation be issued as provided by law.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file, to which reference is made. They pray that a transcript of the record, proceedings and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted to the Supreme Court of the United States, and they further pray that a proper order relating to the security to be required of them be made.

Anthony P. Donadis, Jervis Langdon, Jr., Guernsey Orcutt, Marion B. Pierce, Leo P. Day, Solicitors for Petitioners.

[fol. 220] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 17, 1937

Now comes the Baltimore and Ohio Railroad Company, Central Indiana Railway Company, The Chesapeake and Ohio Railway Company, Chicago & Erie Railroad Company, Chicago, Indianapolis and Louisville Railway Company, H. R. Kurrie and Homan D. Pettibone, Trustees, Detroit, Toledo & Ironton Railroad Company, Erie Railroad Company, Grand Trunk Western Railway, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, Norfolk & Western Railway Company, H. B. Stewart and William L. Day, Trustees, Northern Ohio Railway Company and Akron, Canton & Youngstown Railway Company, The Pennsylvania Railroad Company, Pere Marquette Railway Company, Norman B. Pitcairn and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company and The Ann Arbor Railroad Company, and The Wheeling and Lake Erie Railway Company, petitioners herein, and present with their petition for appeal herein this assignment of errors and say that in the record and proceedings in the above-entitled cause and the decree made and entered against them therein on the 21st day of January, 1937, there is error in the particulars here-
[fol. 221] inafter set forth.

The District Court for the Northern District of Illinois, Eastern Division, erred in making the decree and in dismissing the petition herein in the following respects:

(1) It erred in finding that the evidence supports the findings of the Commission, and in making its order dated April 30, 1936 in Investigation and Suspension Docket No. 3985, the Commission did not exceed its authority, and that said findings support the conclusions and its order of April 30, 1936 prescribing maximum reasonable rates for the transportation in question.

(2) It erred in finding that the Commission's conclusion that the rates prescribed in the order of April 30, 1936, for future application will be maximum reasonable rates, is supported by evidence.

(3) It erred in finding that the Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers is supported by the evidence.

(4) It erred in finding that the Commission properly gave consideration to the effect of rates upon the movement of traffic.

(5) It erred in finding that the Commission's conclusion that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, dis-
[fol. 222] tance considered, than the rates applying in either territory through which said interterritorial traffic passed.

(6) It erred in finding that the Commission's order of April 30, 1936, in Investigation and Suspension Docket No. 3985 is valid.

(7) It erred in finding that it was not required to pass upon the validity of the Commission's order of March 11, 1935.

(8) It erred in finding that the order of April 30, 1936, in Investigation and Suspension Docket No. 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.

(9) It erred in finding that the bill of complaint herein should be dismissed for want of equity at plaintiffs' costs.

(10) It erred in failing to find, as it should have done, that the orders of the Commission in Investigation and Suspension Docket No. 3985, dated March 11, 1935 and April 30, 1936, and the order in Investigation and Suspension Docket No. 4198, dated April 30, 1936, are arbitrary and unjust, are contrary to the evidence of record and without support of any substantial evidence properly before the said Commission in the proceedings in which they were made, and that said findings are against the indisputable character of, and the manifest weight of, the evidence.

(11) It erred in failing to find, as it should have done, that the said orders of the Commission prescribe and require plaintiffs to maintain rates which are less than reasonable maximum rates, and that the action of the Commission in making them was therefore arbitrary, unjust and without lawful authority.

(12) It erred in failing to find, as it should have done, that the said orders of the Commission prescribe and order [fol. 223] plaintiffs to publish and maintain rates which result in the undue preference of manufacturers and shippers located in the South and undue prejudice of the manufacturers and shippers located in the North, which these carriers by the provisions of Section 3 of the Interstate Commerce Act are forbidden to publish and maintain.

(13) It erred in failing to find, as it should have done, that the said orders of the Commission arbitrarily required reductions in rates that had been published and made effective in purported compliance with the Commission's decision in Investigation and Suspension Docket No. 3511, notwithstanding that those rates were clearly not involved in Investigation and Suspension Docket No. 3985.

(14) It erred in failing to find, as it should have done, that there has been no understanding or agreement between the central territory lines, on the one hand, and the southern carriers, on the other, as to the divisions to be received by either or both of them out of the rates fixed by the Commission in Investigation and Suspension Docket No. 3985.

(15) It erred in failing to find, as it should have done, that the Commission's order of April 30, 1936, which pre-

scribed and required petitioners to publish and maintain and charge the third successively lower basis of rates without having taken or heard any evidence or facts but made solely on petitions or pleadings, was arbitrary and unlawful and denied petitioners the hearing provided for by law.

(16) It erred in failing to find, as it should have done, that the said orders of the Commission were not supported by basic findings that the rates prescribed were reasonable maxima.

[fol. 224] (17) It erred in failing to find, as it should have done, that the Commission is without lawful power or authority to compel petitioners to join the southern carriers in rates made lower then reasonable maxima, in order to enable southern producers of coke better to compete with producers in the North.

(18) It erred in failing to find, as it should have done, that the said order of Commission requiring petitioners to charge shippers in the North reasonable maximum rates and compelling petitioners to join the southern carriers in rates from the South to the North less than reasonable maxima, would require petitioners to engage in a prejudicial and preferential practice in violation of law.

(19) It erred in failing to find, as it should have done, that the said orders of the Commission were beyond its lawful powers in that the rates therein prescribed were based on competitive conditions between shippers and railroads in the South on the one hand and shippers and railroads in the North on the other hand, and in utter disregard of transportation conditions.

(20) It erred in failing to find, as it should have done, that transportation conditions applicable in connection with joint through rates on coke from the South to the North are more onerous than apply within the North, and that reasonable maximum rates on coke from the South to the North therefore must be higher than are applicable within the North.

(21) It erred in failing to find, as it should have done, that the Commission arbitrarily disregarded and rejected certain well known and long-recognized standards for testing and prescribing reasonable maximum rates, and in fact [fol. 225] tested and fixed the rates on coke from the South

to the North by a standard or a basis contrary to those usually employed.

(22) It erred in failing to find, as it should have done, that the rates fixed by the Commission on coke from the South to the North tend to equalize disadvantages of geographical location, opportunities or abilities, which is beyond the lawful powers of the Commission to do.

(23) It erred in failing to find, as it should have done, that there was no substantial evidence before the Commission to support its conclusion that the prescribed rates are reasonable maximum rates.

(24) It erred in failing to find, as it should have done, that the indisputable character of the evidence before the Commission establishes that rates fixed and ordered are less than reasonable maximum rates.

(25) It erred in failing to find, as it should have done, that the rates applicable to the transportation of coke in the North are subnormal rates, as are the rates voluntarily maintained by the southern carriers within the South, and neither basis affords a lawful or proper criterion for fixing maximum reasonable rates from the South to the North.

(26) It erred in failing to find, as it should have done, that there was no evidence to support the erroneous assumption by the Commission that the share of the petitioners out of the joint through rates prescribed would be equivalent to the earnings they would receive for the transportation of coke within their own territory for like distances at the same level of rates.

(27) It erred in failing to find, as it should have done, that the action of the Commission in suspending in its Investigation and Suspension Docket No. 4198 the tariffs naming [fols. 226-228] rates on coke from southern manufacturing points to destinations in central territory and not the concurrences of central territory carriers providing for rates on the maximum reasonable basis previously prescribed by the Commission created a conflict between tariffs and concurrences which deprived petitioners of their right to reasonable compensation based on the reasonable and remunerative joint through rates so prescribed by the Commission for which concurrences were in effect.

(28) It erred in failing to issue the injunction prayed for in the petition herein.

Wherefore, petitioners pray that the said decree entered herein on the 21st day of January, 1937, be reversed and that the said District Court of the United States for the Northern District of Illinois, Eastern Division, be directed to enter a decree granting the petition of the petitioners, and that said orders of the Interstate Commerce Commission be declared void and perpetually set aside, suspended and annulled, and that your petitioners may have such other and further relief as may be appropriate.

Anthony P. Donadio, Jervis Langdon, Jr., Guernsey Orcutt, Marion B. Pierce, Leo P. Day, Solicitors for Petitioners.

[fols. 229-232] Bond on Appeal for $1,000.00, approved and filed March 17, 1937, omitted in printing.

[fols. 233-235] In United States District Court

[Title omitted]

Order Allowing Appeal

Upon the entering of the final decree in this cause came Leo P. Day, counsel for petitioners, and filed their assignment of errors and petition for appeal, and it is hereby

Ordered that an appeal by petitioners in the above entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered on January 21, 1937, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States, said appeal being hereby made returnable thirty (30) days from the date hereof.

It is Further Ordered that the bond on appeal be and the same is hereby fixed at the sum of One Thousand Dollars ($1,000.00).

Dated March 17, 1937.

—— ——, United States Circuit Judge. John P. Barnes, Charles E. Woodward, United States District Judges.

[fols. 236-237] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

For satisfactory reasons appearing to the Court, the time for the docketing of this cause in the Supreme Court pursuant to the appeal sued out, is extended to the 15th day of December, 1937, and the date on which plaintiffs will request the Court to approve the statement of the evidence in condensed form, is postponed to December 1, 1937.

Barnes.

Dated November 15, 1937.

[fol. 238] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING NARRATIVE STATEMENT OF EVIDENCE, ETC.—December 1, 1937

This cause coming on for hearing on the motion of petitioners (appellants) for an order approving the narrative statement of evidence filed herein and certifying original exhibits to the Supreme Court of the United States, and the court being fully advised in the premises,

It is Ordered:

(1) That the narrative statement of evidence filed herein, and which, with the original exhibits offered in evidence and to be certified separately to the Supreme Court of the United States, is a true and complete statement of all the evidence introduced in this cause and comprises all the evidence offered and received on the trial hereof, be and it is hereby approved.

(2) That the clerk of this court, in preparing the transcript of the record on the appeal herein to the Supreme Court of the United States shall certify to said court all [fols. 239-240] exhibits and other documents which were attached to petitioners' Exhibit 4 introduced in evidence on the trial of this cause in this court, and the said exhibits so attached to petitioners' Exhibit 4 being marked before the

Interstate Commerce Commission as Exhibits 1 to 89, both inclusive; but shall not include the transcript of oral testimony included in said petitioners' Exhibit 4 for the reason that said testimony has been reduced to narrative form and is being certified and forwarded in the transcript of record; that said exhibits shall be certified and forwarded by the Clerk of this court to the Supreme Court of the United States as original exhibits, not as part of the transcript of record but separately therefrom, and that any party hereto may refer to said original exhibits in their briefs and arguments with like effect as though they were printed as part of the record.

Evan A. Evans, Judge, United States Circuit Court.
Charles E. Woodward, John P. Barnes, Judges of the United States District Court.

[fol. 241] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed December 6, 1937

To the Honorable Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Please prepare a transcript of record in the above-entitled cause on appeal to the Supreme Court of the United States, including therein the following:

(1) Bill of complaint or petition, which should include Exhibits A, B, C and D, thereto.
(2) Answer of the United States of America.
(3) Answer of the Interstate Commerce Commission.
(4) Order setting case for hearing.
(5) Narrative statement of evidence.
(6) Plaintiffs' proposed findings of fact and conclusions of law.
(7) Findings of fact and conclusions of law filed by the Court.
(8) Order approving narrative statement providing for Certification of exhibits.
(9) Final decree.

(10) Notice of application for order allowing appeal.
[fols. 242-243] (11) Petition for appeal.
(12) Assignment of errors.
(13) Order allowing appeal.
(14) Citation on appeal.
(15) Bond on appeal.
(16) Order, dated November 15, 1937, enlarging time for docketing cause in the United States Supreme Court, and the date on which plaintiffs would request the Court to approve statement of the evidence.
(17) Certified transcript of evidence before the Interstate Commerce Commission at hearing in Louisville, Kentucky, September 11, 12, 13 and 14, 1934, except the oral testimony, the oral testimony having been reduced to narrative form.
(18) Præcipe for record on appeal and acknowledgment of service thereof.

—— ——, Attorney for Plaintiffs.

Service of the above was aeknowledged this 3rd day of December, 1937.

Elmer B. Collins, Solicitor for United States. J. Stanley Payne, Solicitor for Interstate Commerce Commission. —— ——, Solicitor for Southern Railroads. —— ——, Solicitor for Southern Shippers. Arnet B. Cronk, Harry I. Allen, Solicitor- for Northern Shippers. Adolph J. Radosta, Jr., Solicitor for Northern Shippers.

[fol. 244] In United States District Court

[Title omitted]

Defendants' Præcipe for Transcript of Record—Filed December 8, 1937

To the Honorable Henry W. Freeman, Clerk:

In preparing the transcript of record in the above-entitled cause on appeal to the Supreme Court of the United States, please include therein, in addition to the matter specified in the plaintiffs' præcipe, the following:

1. Petition of intervention and answer (one document) of The Cincinnati, New Orleans & Texas Pacific Railway

Company, Southern Railway Company, Illinois Central Railroad Company, Louisville & Nashville Railroad Company, and Nashville, Chattanooga & St. Louis Railway.

2. Petition of intervention of Alabama Iron & Steel Shippers' Conference.

3. Intervening petition of Interlake Iron Corporation et al.

4. Intervening petition of Citizens Gas Coke Utility et al.

5. Objections filed on behalf of defendants to plaintiffs' requested findings of fact.

[fol. 245-246] 6. Copy of Commission's supplemental report on reconsideration, decided December 7, 1936, in Investigation & Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, and the Commission's order of the same date, accompanying said report.

Elmer B. Collins, Solicitor for United States. J. Stanley Payne, Solicitor for Interstate Commerce Commission. —— ——, Solicitors for southern railroads. J. V. Norman, Solicitor for southern shippers.

Service of the above supplemental præcipe is acknowledged this 8th day of December, 1937.

Leo P. Day, Solicitor for Plaintiffs. Harry I. Allen, Solicitor for Northern Shippers. —— ——, Solicitor for Northern Shippers.

[fol. 247] [File endorsement omitted]

[fol. 248] In United States District Court for the Northern District of Illinois, Eastern Division at Chicago, October Term, A. D., 1936

Equity No. 15266

Baltimore & Ohio Railway Company et al., Plaintiffs,

vs.

United States of America et al., Defendants

Narrative Statement of Evidence—Filed December 1, 1937

Be it Remembered that heretofore, on, to-wit, the 15th day of October, A. D. 1936, being one of the judicial days of said term of said Court, this cause came on for hearing

before the Honorable Evan A. Evans, Judge of the United States Circuit Court, the Honorable John P. Barnes, and the Honorable Charles E. Woodward, Judges of the District Court of the United States: whereupon the following proceedings were had in due form of law:

Present:

Mr. L. P. Day, Appeared on behalf of Plaintiffs.

[fol. 249] Mr. Adolph J. Radosta, Jr., Appeared on behalf of Certain Intervening Petitioners.

Mr. A. B. Cronk, Appeared on behalf of Certain Intervening Petitioners.

Mr. H. I. Allen, Appeared on behalf of Certain Intervening Petitioners.

Mr. Elmer B. Collins, Special Assistant Attorney General, Appeared on behalf of the United States of America.

Mr. J. Stanley Payne, Appeared on behalf of the Interstate Commerce Commission.

Mr. J. V. Norman, Appeared on behalf of Certain Southern Shippers.

Mr. William A. Northcutt, Appeared on behalf of Certain Southern Carriers.

COLLOQUY

Mr. Radosta: If the Court please, this is a petition for leave to intervene, of the various Petitioners.

Judge Evans: Is that the only matter that is before us, the petition to intervene?

Mr. Radosta: No, this is preliminary to the main hearing.

Judge Evans: Any objection to the petition to intervene, by any of the Petitioners? Is there any objection to the intervention on the part of any party here?

[fol. 250] Mr. Collins: I have no objection on behalf of the United States.

Judge Evans: Let the order be entered permitting intervention. Who are they?

Mr. Radosta: The Interlake Iron Company, the Milwaukee Coke & Gas Company, the North Shore Coke & Chemical Company. They are the parties I represent. Three of them were parties before the commission, and under the Statute they have the right to intervene. The other petition is presented by Mr. Cronk.

Judge Evans: Now, about presentation of the case. How is it going to be presented? Who is going to present it and who is going to oppose it?

Mr. Payne: If your Honors please, are these petitions all accepted?

Judge Evans: Yes, and no objections.

Mr. Day: If your Honors please, speaking for the Plaintiffs, I shall offer some documentary evidence and argue the case on behalf of the plaintiffs.

Judge Evans: All of them?

Mr. Day: All of them. There will be intervenors supporting our position, and then I understand the Government, the Interstate Commerce Commission and certain southern interests will appear in opposition.

[fol. 251] Judge Evans: How long will it take you?

Mr. Day: I think——

Judge Evans: First, to introduce your evidence?

Mr. Day: Not five minutes.

Judge Evans: How long on the argument?

Mr. Day: Well, I should like about an hour, if that is agreeable to the Court, for the plaintiffs.

Judge Evans: How long on the Defendants' side?

Mr. Collins: I would like about a half hour for the United States, the statutory defendant.

Judge Evans: Who represents the Commerce Commission?

Mr. Collins: Mr. Payne.

Judge Evans: Do you intend to argue, too?

Mr. Payne: Your Honors, I will only need a very few moments. Mr. Norman, representing the southern shippers, and Mr. Northcutt representing the southern carriers will also participate on our side.

Mr. Cronk: I would like ten or fifteen minutes.

Mr. Radosta: Mr. Allen and I represent the Intervenors and we would like a few minutes.

Judge Evans: Is there any difference between the Plaintiffs and the Intervenors?

Mr. Allen: Substantially none. We may not want to argue the case, but we would like to reserve the right to argue.

[fol. 252] Judge Evans: Proceed and introduce your evidence. By the way, have you filed your answers?

Mr. Collins: I have filed for the United States.

Mr. Payne: I have filed on behalf of the Interstate Commerce Commission.

Judge Evans: How many copies?

Mr. Payne: I think I sent three additional copies with the original.

Judge Evans: Did you say you haven't got them?

The Clerk: There is only one copy of each answer on file.

Judge Evans: There is only one copy of each answer.

Mr. Collins: I have some copies here.

Judge Evans: Proceed. Send up your copies. If you have them, send them up. Likewise, there are not three copies of the intervening petitions. See that they are on file within twenty-four hours.

Mr. Day: If the Court please, Plaintiffs at this time desire in evidence certain decision of the Interstate Commerce Commission in Investigation & Suspension Docket 3511. Coke between points in Central and Illinois territory. It is reported in 194 I. C. C. 640. If the Court please, may that document be marked Exhibit 1.

[fols. 253-305] Judge Evans: Yes, it may be. Any objection to it being received?

Mr. Payne: None on behalf of the Commission.

Judge Evans: Mark it and it may be received.

Thereupon the said document so offered and received in evidence, was Marked Plaintiffs' Exhibit 1, and is in words and figures as follows, to wit:

Plaintiffs' Exhibit 1 omitted. See Exhibit "D", printed side page 48, ante.

[fols. 306-319] Mr. Day: The Plaintiffs now desire to offer in evidence the decision of the Interstate Commerce Commission in its Investigation & Suspension Docket number 3985, coke from Alabama and Tennessee to Central territory. It is reported in 208 I. C. C., page 281. We ask that that be marked Plaintiffs' Exhibit 2 and received in evidence.

Judge Evans: Any objection? It may be received.

Thereupon the said document so offered and received in evidence, was marked Plaintiffs' Exhibit 2, and is in words and figures as follows, to-wit:

Plaintiffs' Exhibit 2 omitted. See Exhibit "A", printed side page 24, ante.

[fols. 320-326] Mr. Day: Plaintiffs desire to offer in evidence decision of the Interstate Commerce Commission in the same proceeding I. & S. Docket 3985 reported in 215 I. C. C., 384 and dated April 30, 1936. We ask that that be marked as Plaintiffs' Exhibit 3.

Judge Evans: Any objection?

Mr. Payne: No objection.

Judge Evans: It may be received.

Thereupon the said documents so offered and received in evidence, was marked Plaintiffs' Exhibit 3, and is in words and figures as follows, to wit:

Plaintiffs' Exhibit 3 omitted. See Exhibit "B", printed side page 38, ante.

[fol. 327] Mr. Day: Plaintiffs desire to offer into evidence copy of the transcript of the record made before the Interstate Commerce Commission in its Investigation & Suspension Docket number 3985, coke from Alabama and Tennessee to Central territory as certified to by the secretary of the Interstate Commerce Commission under date of October 12, 1936. We ask that this be marked Plaintiffs' Exhibit 4 and received in evidence.

Judge Evans: Any objection?

Mr. Payne: No objection.

Judge Evans: As a matter of practice, is that in narrative form?

Mr. Day: No, your Honor, it is a complete transcript of the evidence and it is offered because one of the points raised by the plaintiffs is that the record contains no substantial evidence to support the Commission's order.

Judge Evans: It may be received.

Thereupon the said document so offered and received in evidence, was marked Plaintiffs' Exhibit 4, and is in words and figures as follows, to wit:

[fol. 328] PLAINTIFFS' EXHIBIT 4

Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the transcript of the stenographer's notes of the hearing held September 11, 12, 13, and 14, 1934, at

Louisville, Ky., before Examiner J. P. McGrath, and of exhibits filed at said hearing or in response to requests made at said hearing in Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of October, A. D. 1936.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 329] **Narrative Statement of Evidence**

BEFORE THE INTERSTATE COMMERCE COMMISSION

In I. & S. Docket 3985

Coke from Alabama and Tennessee to Central Territory

This proceeding came on for hearing before Examiner J. P. McGrath on September 11, 1934, at Louisville, Ky., and the hearing thereof was continued thereafter from day to day until September 14, 1934.

APPEARANCES

For Responding Proponents: L. P. Day, Guernsey Orcutt, R. T. Wilson, Jr., and A. P. Donadio.

For Protesting Respondents: E. D. Mohr and E. R. Roby for Louisville & Nashville Railroad Company. Charles Clark for Southern Railway System Lines. A. L. Holton for Interstate Railroad Company. Charles P. Reynolds for N. C. & St. L. Railway. L. R. Hall and M. G. Roberts for St. L. S. F. Railway. J. I. Bonner for Mobile and Ohio Railroad.

For Intervening Supporters: F. A. Doebber for Citizens Gas Company of Indianapolis; Milwaukee Coke and Gas Company, Milwaukee, Wis.; Interlake Iron Corporation, Chicago, Ill.; LaClede Gas Light Company and St. Louis Gas and Coke Corporation, George B. Evans, Receiver. John Long for Citizens Gas Company of Indianapolis. John H. Wilharm for Diamond Alkali Company. John B.

Keeler for Hamilton Coke & Iron Company. H. A. Hollopeter for Indiana Consumers Gas & By Product Company. O. R. Livinghouse for Public Service Commission, Indianapolis. A. B. Cronk for Citizens Gas Company of [fol. 330] Indianapolis. D. L. Bennett for Wheeling Steel Corporation. R. B. Coapstick for Indiana State Chamber of Commerce.

For Intervening Protestants: J. V. Norman for Alabama Iron & Steel Shippers Conference. A. J. Ribe for Alabama Iron & Steel Shippers Conference. C. E. Widell for Tennessee Products Corporation and Black Diamond Coal Mining Company.

The issues were stated at the outset by the Examiner as follows:

STATEMENT OF ISSUES

Examiner McGrath: The Interstate Commerce Commission has assigned for hearing at this time and place Investigation and Suspension Docket No. 3985 entitled "Coke From Alabama and Tennessee to Central Territory."

By schedules filed to become effective May 1, 1934, or later date Respondent proposed to revise their rate on coke, coke breeze, coke dust, and coke screenings, carloads from the Birmingham, Alabama District, Chattanooga, Tennessee, Southwest Virginia and Knoxville, Tennessee through Central Territory and Illinois Territory.

The Central and Illinois Territory Respondents with certain exceptions proposed as of the same date to revoke their concurrences in the present rates on this traffic and to substitute concurrences, limiting the application and rate to no lower than those in the mileage scales set forth in "Coke Between Points in Central and Illinois Territories," 194 I. C. C. 640.

[fol. 331] Upon protest of the Southern Carriers parties to these rates and of certain shippers, operation of the schedules, including the proposed revocation by the Central Territory and Illinois Territory Respondents of their concurrences in the present rates and the substitution therefor of restricted concurrences was suspended until December 1, 1934 or later.

Respondents may proceed.

Mr. Donadio: I suppose that the Northern Respondents will go first inasmuch as the Southern Respondents are in

effect Protestants. I will call Mr. Kern as a witness, for the Northern Respondents.

ROY S. KERN, called as a witness in behalf of the northern railroads, respondents, having been duly sworn, testified as follows:

Direct examination.

By Mr. Donadio:

I am Chairman of the Coal, Coke and Iron Ore Committee of the Central Freight Association Territory (hereinafter referred to for convenience as central or C. F. A. territory) of which all coal originating and important coal carrying railroads within that territory are members. The Louisville and Nashville Railroad and the Southern Railway are also members but I am not speaking for them.

Although the issues in this investigation relate only to rates published in Supplement No. 8 to Agent F. L. Speiden's Chattanooga Coke Tariff No. 302-B, I. C. C. No. 1770, and Supplement No. 6 to Agent F. L. Speiden's Alabama Coke Tariff No. 252-A, I. C. C. No. 1797, applicable upon Coke, Coke Breeze, Coke Dust and Coke Screenings from ovens at Chattanooga, Tennessee, and in the Birmingham, Alabama District, comprising stations:

Acmar, Alabama City, Bessemer, Birmingham, Calor, Coal City, Ensley, Exum, Fairfield, Grants, Holt, Margaret, New Action, New Action No. 5, North Birmingham, Overton No. 1, Overton No. 2, Pratt City, Ragland, Ragland Coal Co., Ridgefield, Tarrant, Thomas, Woodward and Wylam, Alabama.

[fol. 332] to certain destinations north of the Ohio River which, under the revision in rates effective March 15, 1934, in purported compliance with the decision in I. C. C. Docket No. 22052, decided with I. & S. Docket 3511, 194 I. C. C. 640, were not changed because they were less than the maximum scale set forth in Column 3 of Appendix 8 of that decision, it appears advisable briefly to sketch the history of the negotiations leading up to the establishment of through rates from the Birmingham District to destinations in central territory where such rates were in effect immediately prior to the March 15, 1934, revision, and to deal with the basis for such, as well as for the rates from Chattanooga,

Tennessee, to the same destination territory. In the Commission's supplemental order in this case (I. & S. Docket No. 3985) certain rates published by the Louisville and Nashville Railroad from origins on its line and on the line of the Interstate Railroad are also under suspension.

According to the records of the Coal, Coke & Iron Ore Committee, the question of establishing through rates from Birmingham to central territory was first raised in December, 1923, when the Louisville & Nashville requested that arrangements be made by the Committee to hear producers of coke in the Birmingham District on the question. This gave rise to a rather lengthy controversy between shippers, as a result of which the carriers' considerations were at a standstill for more than a year. On January 15, 1925, the Louisville & Nashville and Southern roads filed a rate proposal contemplating through rates from the Birmingham District to destinations in central and Illinois territories, made upon differentials over Chattanooga rates which, generally speaking, reflected the same relationships as existed through the rate-making Ohio River gateways, viz., 34 cents, 50 cents and 75 cents, depending upon the destination territory. This proposal was submitted and considered by the Southern Freight Association, the Illinois Freight Association, and the Central Freight Association Coal, Coke & Iron Ore Committee. The Southern Freight Asso-
[fol. 333] ciation promptly recommended it, but the other committees did not. The Illinois Freight Association specifically declined the proposal, and the C. F. A. Coal, Coke & Iron Ore Committee took no definite action. Because of the failure of the Committee to pass affirmatively upon the application, the rates contemplated by it were not published but the question was held up until the strike of the anthracite coal miners, which began September 1, 1925, and was not settled until February 18, 1926. With the advent of the strike, producers of coke at Birmingham renewed with increased vigor their demands for through rates less than the prevailing combinations. Through efforts of the Semet-Solvay Company a conference between representatives of some carriers and J. W. Harnak, then Assistant General Traffic Manager of the Semet-Solvay Company, was held in Chicago on September 30, 1925. At that conference, according to the official records thereof, Mr. Harnak contended that due to the anthracite strike there existed a shortage of domestic fuel in Michigan and that by-product

coke was the most satisfactory substitute for anthracite as a domestic fuel. He contended that the increased demands on Semet-Solvay's production within central territory, particularly in the Detroit district, were such that it was necessary to augment their supply of coke with that produced at ovens in the Birmingham district. He said that so far as C. F. A. Territory south of the lower peninsula of Michigan was concerned the increased demands for coke resulting from the anthracite strike could be supplied by the ovens situated in C. F. A. Territory, and therefore restricted his request to rates from Birmingham to a portion of the lower peninsula of Michigan. As a result of the representations made at that conference, the carriers published through rates, effective December 27, 1925, from Birmingham to the following territory in the lower peninsula of Michigan:

[fol. 334] Beginning at the junction point of the southern line of the State of Michigan with Lake Erie, thence following said southern line of the State of Michigan, westwardly to a point on the Grand Rapids & Indiana Railroad (Pennsylvania System) just south of Sturgis, Mich., thence northwardly on and via said line of the Grand Rapids & Indiana through Sturgis, Wasepi, Vicksburg, Kalamazoo, Plainwell, Monteith, Grand Rapids and Cedar Springs, to and including Howard City, Mich., thence eastwardly on and via line of the Pere Marquette Railway through Edmore, Alma and Saginaw to Bay City, Mich., inclusive.

The rate basis authorized as an emergency measure was:

To points on and east of a line beginning at the Southern shore of the State of Michigan at a point on the Cincinnati Northern R. R. just south of Waldron, Mich., thence northwardly on and via Cincinnati Northern through Waldron, Hudson and Addison Junction to and including Jackson, Mich., thence northwardly on and via Michigan Central R. R. from Jackson, Mich., through Lansing, Owosso and Saginaw, Mich., to Bay City, Mich., inclusive.

To destinations within the described area west of the dividing line, rates were made 75 cents per net ton over the rates in effect from Chattanooga. The rates so based were published to and did expire with April 30, 1926, notwithstanding the efforts of the Southern carriers and Birmingham shippers to have them continued in effect. The nego-

tiations between the carriers and the shippers, however, did not cease with the expiration of the emergency rates, and the Coal, Coke & Iron Ore Committee, C. F. A. Territory, appointed a special committee for the purpose of working out a basis for rates from Birmingham that might be permanently established. This special committee recommended and the Committee itself approved a basis of rates $1.50 over the Chattanooga rates to destinations in Michigan outlined above, to which the differential in the instance of the emergency rates was $1.00, and a differential of $1.25 over Chattanooga to destinations to which the emergency rates were predicated upon a differential of 75 cents. This action, however, was never adopted by the Southern carriers and consequently rates reflecting the stated basis were never published.

[fol. 335] Effective November 22, 1926, following numerous conferences, in some of which Director of Traffic Hardie of the Interstate Commerce Commission participated, the emergency rates, which expired on April 30, 1926, were restored as a temporary proposition pending the working out of a basis for rates more satisfactory to Northern carriers and shippers. These rates were published to expire with April 1, 1927. From then on until December 31, 1931, the rates were continued from year to year, but on the date last mentioned the Southern railroads eliminated the expiration date, notwithstanding the fact that the Coal, Coke & Iron Ore Committee (on November 19, 1931) decided that the rates should continue to carry an expiration date. When the tariffs of the Southern roads eliminating the expiration date came to the attention of the C. F. A. Coal, Coke & Iron Ore Committee, the matter was considered and at a meeting held on January 6-7, 1932, I, as Chairman of the Committee, was directed to and did formally protest to Chairman Tilford of the Southern Coal & Coke Committee the action of the Birmingham lines in making the rates on coke to Michigan destinations permanent charges, and urging him to arrange for immediate correction of the tariffs to conform to the action of C. F. A. roads on November 19, 1931, recommending that the expiration date be continued. The Southern carriers refused to comply with this request on the ground that it was contrary to the wishes of the Interstate Commerce Commission, which had criticized them for continuing the rates from year to year

instead of either permitting them to expire or making them permanent by eliminating the expiration date.

The rate situation did not undergo any appreciable change until the tariffs were filed in purported compliance with the order of the Commission in Docket 22052, effective March 15, 1934. I desire to emphasize that the actions of C. F. A. carriers with respect to through rates from Birmingham were confined exclusively to a restricted territory [fol. 336] in the lower peninsula of Michigan which I have described in detail and that they were all intended either as emergency or temporary expedients to meet alleged distressed conditions in the lower peninsula of Michigan or for application pending determination and the publication of a more satisfactory level. To my knowledge, the C. F. A. roads have never either by expressed application or implication conceded that the rates which reflected low differentials over the extremely depressed basis of rates from Chattanooga were reasonable and proper.

Rates on coke from Chattanooga, Tennessee, to C. F. A. Territory, as well as Illinois, were for many years the same as from the Connellsville District of western Pennsylvania, notwithstanding the fact that the distances from Chattanooga greatly exceeded those from Connellsville. This parity of rates was not reflected in the territory east of a line from Columbus to Toledo, Ohio, where the distances from Connellsville were so much less than Chattanooga as to preclude any equalization of rates. To all of the territory west of that line, however, Chattanooga rates were consistently maintained on the Connellsville basis to the utter disregard of relative distances or transportation conditions. Because this rate situation from Chattanooga and also to a lesser extent from Birmingham is described at considerable length in the decision of the Interstate Commerce Commission in I. & S. Docket 3511 (Docket 22052), 194 I. C. C. 640, at pages 671-2, it does not seem necessary for me to dwell further upon it.

In passing I might state that the treatment which I have given the history of the Birmingham rates could have been greatly elaborated upon. Because, however, the original basis of rates is now obsolete and the C. F. A. carriers are here advocating rates on coke made strictly on a mileage basis, further details of the old arrangements I feel would add nothing to this record. So, too, I do not feel it is neces- [fol. 337] sary for me to treat at further length with the

Chattanooga rate situation and the impropriety of any basis of rates from that point founded upon a parity with rates from the Connellsville Region.

With this explanation of the history of the involved rates, I come to the matter of presenting in behalf of the northern carriers justification for the suspended rates.

[fol. 338] Respondents' Exhibit 1 is a copy of Appendix 8 to the decision of the Interstate Commerce Commission in I. & S. Docket No. 3511, setting forth the several scales prescribed in that case. The scale under the Column 2 is that prescribed for Central Freight Association and Illinois territories, and Column 3 is that prescribed for interterritorial application from the South to the North and from certain central territory origins to western trunk line territory. Scale 4 is really the same arbitraries applicable within western trunk line territory.

With respect to the C. F. A. intraterritorial adjustment, all of the rates are now on the C. F. A. scale as set forth in Appendix 8, Column 2, of Exhibit No. 1, except a few rates for short hauls which were necessitated to meet water and motor truck competition and certain special circumstances within steel centers, particularly the Mahoning and Shenango Valleys. None of these depressed rates, so far as I have been able to determine, can possibly affect the rate situation from Southern origins. In the event the Examiner or persons on the other side of this case desire to go into the matter of depressed short haul rates within central territory further, I am prepared to cite them specifically, although from the very nature of them they constitute no proper part of this proceeding.

Another exception which should here be noted is the instance of rates which were prescribed by the Public Utilities Commission of Ohio in its Docket 6544, which was heard jointly with I. C. C. Docket I. & S. 3511 on the cooperative plan and decided January 26, 1934. The scale prescribed by the Ohio Commission differs slightly from the I. C. C. scale for distances up to 40 miles. Over 40 miles the scales [fol. 339] are identical. The variations in the shorter hauls may be stated as follows:

For the first 10 miles the interstate scale is 90 cents and the Ohio State scale 85 cents; for the block 15 miles and over

10 the interstate scale is $1.00 and the State scale 85 cents; for distances 20 miles and over 15 both scales are $1.00; for distances 30 miles and over 20 the interstate scale is $1.10 and the State scale $1.00; for distances 40 miles and over 30 the interstate scale is $1.20 and the State scale $1.15. Beyond 40 miles the scales are identical.

It has been contended by the parties in this case that the action of the C. F. A. carriers in revoking the concurrences and substituting therefor restricted concurrences limiting the measure of the rates to a basis no lower than the Appendix 8, Column 3, of I. & S. Docket 3511 was arbitrary and, I believe they used the words "uncalled for." I might state the C. F. A. carriers in that connection in several conferences expressed their views that inasmuch as they themselves had decided to observe the maximum scale within their territory they expected the Southern Roads to do likewise in connection with the interterritorial rates but those suggestions or pleas were turned down. We made a very careful investigation as to the legal remedies available to the carriers in like situations and the only effective manner that we could turn up was the treatment of concurrences.

I, myself, went over the matter very carefully with Mr. Crossland of the Commission and he verified our conclusions that that was our only recourse and that recourse was one not unusual between parties to joint rates where their ideas conflicted. It has many times been resorted to by the Southern Railroad, Complainant in this case and in several cases the Interstate Commerce Commission has commented upon that fact. Nowhere have they ever said to my knowledge that that was arbitrary or unnecessary or unreasonable.

[fol. 340] There are one or two of the short haul rates referred to in the Mahoning and Shenango Valleys that are interstate in application, for example, Youngstown to Farrell, Sharon and Sharpsville, Pa. Via the New York Central locally from Youngstown to Farrell the distance is 13 miles, Sharon 13 miles and Sharpsville 16 miles, present rates 76 cents in each instance, and the scale rates are $1.00. Those are steel-plant-to-steel-plant movements or interplant movements and that is the reason for rates lower than the scale from and to those points. There is no competition because it is coke either made by the buyer or made under contract for the user in the same iron and steel district.

There is another short haul interstate rate from Follansbee, W. Va., to Martin's Ferry, Ohio, a distance of 30 miles and the rate is 60 cents. That rate was put in to meet barge line competition on the Ohio River, actual, not potential.

Cross-examination.

By Mr. Norman:

There has been one general revision made in the rates in Illinois Freight Association territory since this decision. The Illinois carriers advised us that due to the variation in the mileage formula between this case and the Illinois case of some few years ago, the rate levels were substantially the same and they had made a considerable study of the situation and had found out that there was not enough change to justify the expense of re-filing or reprinting the rates so they decided not to, as a temporary measure, but they promised the Central Freight Association carriers that at the first opportunity they would adjust their rates to the scale basis.

[fol. 341] Q. The C. F. A. carriers have construed this order of the Commission in the case to which you have referred as prescribing a maximum scale and as giving you the right to depart therefrom by publishing rates not higher than that scale and you have actually in some instances so done; is that not a true statement?

A. First, let me say that as a matter of construction there is nothing for us to do; the Commission said what it was. In no case have we ever departed where competition was such that it would require changes in rates from other [fol. 342] origins, nowhere in central territory has any coke shipper complained of any reduction that has thus far been made under this scale because there was no competitive situation which we were treating other than to meet truck competition which -as there regardless of the level of the rail rates.

Q. But where in your judgment there exists such competition as justifies a reduction in the rate below the maximum scale prescribed by the Commission you have reserved the right to make such reduction and in some instances have made such reductions?

A. We have a few instances where the rates are below the scale, yes, sir.

Q. You are unwilling, however, to let the southern carriers exercise any such managerial judgment in making their rates from their points to this territory?

A. It is hard to answer that question. You don't have truck competition from Birmingham; you don't have water competition and you don't have the plant-to-plant, interplant or any industrial condition similar to those we find within our own territory. Furthermore, we know we have not hurt any Birmingham shipper by any of the present rates that are published in central territory.

[fol. 343] Q. Under the restricted concurrences which you filed and which are here under suspension, the southern carriers are deprived of their exercise of all such managerial judgment, are they not?

A. Mr. Norman, those concurrences were just a way to achieve an end. I do not believe that the C. F. A. carriers would insist upon those concurrences remaining forever in force. It is contrary to their general policies with respect to the giving of concurrences but as I said on direct examination there was no other way of doing it.

Q. Now come back and answer my question will you? Under the concurrences which you have filed and which are here under suspension the southern carriers are prohibited from exercising any managerial judgment in reducing rates to any point under any circumstances below what you have named in there as a scale?

A. Necessarily, yes. That is so far as we are not depriving them of any right to reduce the rates in their own territory. This does not affect anything except north of the River, nor are we saying to them now or have we ever said to them that after this adjustment is made that they cannot arrange for the execution of new concurrences. You can do that overnight.

Under the tariffs here under suspension the rates from the southern producing points to points in central territory are uniformly approximately 10 per cent higher than they are in central territory. That is the approximate relationship of the two scales.

[fol. 344] Q. Now that applies to the part of the whole north of the river, the Ohio River; does it not?

A. Not under the way the scale is necessarily applied. It applies to the through haul.

Q. So that you are here insisting on a higher rate for the services rendered in C. F. A. territory if the traffic originates in the South than you charge if it originates in C. F. A. territory?

A. There are a lot of ways of answering your question but I guess the direct way of saying it is that mile for mile, yes. When, however, you consider the fact

The average haul of coke within central territory is four or five hundred miles, the rates per ton per mile on the northern scale are as high as, or higher than, on the southern scale, though there are a lot of ways of considering that.

Q. By reason of this longer haul the southern producer is under a handicap in the transportation charges even if the rates were made on the same level, is he not?

A. As applied to the coke the average rate applied from Birmingham would be higher than the average rate applied from a C. F. A. origin, or I. F. A. origin. I mean if both were on the same level, that is both were the same mile for mile.

[fol. 345] Q. Because of the fact the haul from the South is longer now if there is anything to be added to the rates from the South by reason of the additional, or we will say the more adverse transportation conditions, if such exists, ought not that rate to be, that addition, be made to the rate within the Territory where the conditions are more adverse?

A. Theoretically yes, but from a practical standpoint I think it is just as sensible to do it the easy way, and apply a through scale which is inflated sufficient to take care of the situation within the higher rated Territory and when you consider that 10 per cent is only a nominal variation in comparison with what it might have been I don't think that your criticism there is well founded.

Q. At any rate you do not think that the Northern carriers are entitled to demand any higher rate for their services within Northern territory on traffic originating in the South than on traffic originating in the North, do you?

A. We would be perfectly willing to get our locals from the gateways.

Q. That is not answering my question. You divide rates in the North as well as from the South to the North?

A. Yes, we divide them but I would say 75 per cent of the coke moving within the North is a single-line movement and I am saying that very conversatively.

Q. What is your purpose in freezing these rates from the South?

A. The only instance in which the rates might be consid- [fol. 346] ered frozen is under the concurrences and as I said before that was the only way we had of taking care of the situation, the only way we had of protecting our own rates within our own territory. We knew if the Birmingham rates were not adjusted that way that our own adjustment would fall of its own weight and there was at least one State Commission that told me so.

I consider it necessary to require the rates from the South to be on a higher level mile for mile than they are within central territory to protect our adjustment within central territory, even though the hauls from the South are longer than the hauls within central territory and even though their transportation charge under a rate made on the same level would be substantially higher than their competitors' in central territory.

[fol. 347] Cross-examination.

By Mr. Widell:

The only thing I know about the establishment of rates on coke from Chattanooga to central territory originally is that they picked the Connellsville rates and adhered to them, and there is no doubt but that the rates were published with the full concurrences of the central lines at that time. I have never seen any letter or correspondence between the central lines, with respect to the original establishment nor do I know when they were first published. I do know that had the central lines been able to, the Chattanooga rates would have been increased long before this proceeding, because the fallacy of putting them on the Connellsville basis and adhering to that basis has been known to central roads for at least the twenty years with which I have had experience with coke rates.

None of the short haul rates in central territory move foundry coke. Some are put in specifically to move domestic coke. The more important ones are the rates in the Detroit area where the truck competitive rates were checked in to a few points in the immediate vicinity. That is all domestic coke. None of the rates within central territory below the scale affected the Birmingham situation, and con-

stituted no reason for rates below the scale from Birmingham. It was not the fundamental intention to freeze the rates, and the freezing occurred only because that was the only means at our disposal to correct this situation, that is, by the filing of restricted concurrences. Under present conditions the southern carriers could not go into the North on anything less than the maximum scale. The rate situation in central territory today is not such that I feel the South should go in at lower than scale rates. At the present time there are no such conditions that might warrant the central lines granting the southern carriers the privilege [fol. 348] to come in on a basis lower than the maximum scale. We are not treating two sets of shippers within Central Freight Association territory differently. We are treating them both relatively under the Commission's decision. We are adhering to the Commission's conclusion and are not treating two sets of shippers differently when we charge one of them Column 2 rates and the other one Column 3 rates which the Commission said were properly related scales.

Cross-examination.

By Mr. Mohr:

We are getting competitive rates under these restricted concurrences. The central lines object to participating with the southern carriers in the maintenance of rates to northern points on the same level as prevails in the North because the Commission said that the prejudices and preferences that might exist and that we feel do exist can only be eliminated by adherence to the two scales prescribed. It is our position that so long as a reasonable maximum level obtains within central territory, nothing less than the related level prescribed by the Commission as reasonable maxima should obtain interterritorially.

[fol. 349] Q. Are you in a position to state in what respect if at all the Northern Lines, the C. F. A. Lines, would be damaged by participating with the Southern Lines in the maintenance of uniform rates on the basis similar to that prevailing in Central Territory?

A. That is a matter that would involve a good deal of speculation and it is our position that so long as a reasonable maximum level obtains within C. F. A. Territory,

nothing less than that, a related level, should obtain interterritorially.

Q. On what ground is that based?

A. On the ground of the Commission's decision.

The rates of the Illinois Central Railroad from Birmingham to Chicago are not under suspension. They are local rates. They are suspended to the extent that they apply on C. F. A. roads.

Q. Then at the present time there are rates from the Birmingham District to Chicago via the Illinois Central on basis of the scale 2 rates that are not suspended?

A. They are not on the scale 2 basis, I think they are a nickel higher.

Q. Then in order to have the thing clear and in order that there may be no misunderstanding, the action of the Respondents in this case is due solely to the Commission's finding in the case to which you refer?

A. We want it to carry out what we thought were the——

Q. Your conception of it?

[fol. 350] A. —the intention of the Commission 100 per cent and in that way only can we maintain our rate structure within C. F. A. Territory.

Q. In that regard what do you mean by that, that that is the only manner in which you can maintain your rate level? Is it not true with respect to these commodities that there are rates today, for instance, Cast Iron Pipe from the South to the North on the level corresponding with that prevailing in the North?

A. I believe that is true but I also know this, that the Cast Iron Pipe rate situation within the North is the most uncertain thing imaginable.

Q. Is it not true in respect to quite a number of other commodities their rates from the South to the North are on a level no higher than the destination level?

A. I think for every one you find that way I will give you five of the other.

Q. Is it not true there are some such?

A. Cast Iron Pipe is the only one I have familiarized myself with.

Q. And so far as you know with respect to these others it has not had the effect of breaking down the adjustment in the North?

A. I made no investigation whatever but I did look into the Cast Iron Pipe situation somewhat. (Transcript 37-38.)

[fol. 351] Further cross-examination.

By Mr. Norman:

Q. I have one or two questions that I failed to ask you, especially on what has just been asked. You stated in answer to a question of mine that the only way you could maintain your C. F. A. Adjustment was to have a higher basis from the South and also in answer to a question from Mr. Mohr that your reason for making rates higher from the South was the Commission's decision. I will ask you if it is not true that the C. F. A. Lines in the past agreed to the same scale from the South as within the C. F. A. Territory?

A. That has been stated a whole lot and on request of Mr. Dewberry of the L. & N. Railroad I searched out files in the office and I could not verify that that was the fact.

Q. I would like to get this clear. Is your insistence on additional charges, mile for mile, on traffic from the South on a revenue basis, that is from the standpoint of your revenues, or is it from the standpoint of protecting your shippers against competition?

A. From the standpoint fundamentally of a rate situation within the C. F. A. Territory.

Q. You don't think of course that you are entitled to any more revenue for the same service for one shipper than from another do you?

A. For the transportation within C. F. A. Territory?

Q. Yes.

A. I have not stated that.

Q. And therefore it is not from a standpoint of revenue on this particular tariff, it is from the standpoint of pro-
[fol. 352] tecting the shippers on your line?

A. No sir, it is from the standpoint of protecting our rate level within C. F. A. Territory which is going to flop as sure as shooting if the situation is not cleared up satisfactorily.

Q. Don't you control that rate adjustment?

A. No the law controls it.

Q. This is not going to have any effect on the law, is it?

A. No, sir except that it is going to continue prejudices and preferences which we feel exist.

Mr. Mohr: May I inquire if the witness gave the mileages in the case of the rates that were made lower than the scale for inter-plant service?

Mr. Kern: I gave those that were referred to. To my knowledge it is not true that in some instances they are not as high as 80 miles or more. There has not been a deviation from the scale from the Pittsburgh District to Warren, Ohio, nor to Niles, Ohio. I am willing to file, within fifteen days after the close of this record, a statement showing to what extent these rates have been departed from in C. F. A. Territory.

Exam. McGrath: Permission to file that statement within ten days, supplying the opposing side with copies, and furnishing the Commission with two copies, is hereby granted.

Mr. Kern: I do not believe it has been brought out yet but all of the rates which were published to meet motor truck competition bear expiration dates. I shall indicate on the statement every rate that has an expiration date, and the date of expiration.

[fol. 353] Cross-examination.

By Mr. Hollopeter:

The usual manner of publishing joint rates is by mutual agreement, in addition to and apart from that which would result from unlimited concurrences. Other parties to these joint rates have the same right we have, where the rates are published from the North to the South. We did not exercise anything that the southern carriers, both individually and collectively, on other occasions have not done. The publishing line does not do the concurring, it is the participating line that does the concurring, and the publishing line that prints the tariffs. In other words the tariff concurrence is to give to another line the power of attorney to do something that otherwise only you yourself could do, so that the southern lines do not have to issue any concurrences to the northern lines in order to publish a rate from Birmingham to a point in the northern territory or on a northern line.

Q. Why is it necessary to have through rates we will say in the first instance?

A. The whole theory of it is to get below the combinations.

Q. In your position taken in this case in connection with the overhead rates were the Northern carriers concerned more with regard to the level of the rates as with regard to the nonprejudicial nature of the rates that you were concurring in?

A. That is a difficult thing for me to answer. Personally, I believe that the section 3 situation was the principal item.

[fol. 354] Examiner McGrath: Mr. Kern in view of your reliance upon the Commission's findings and orders in Docket I. & S. 3511 and cases joined therewith, I am prompted to ask this question: Is the Commission to understand that if it should vacate and set aside its findings and order in that proceeding fixing maximum reasonable rate on this traffic from the southern producing point to the C. F. A. and Illinois territories that the C. F. A. lines would be willing to join with them in rates no higher than the rates prescribed as maximum between points in C. F. A. territory.

Mr. Kern: No, I don't think that would be a fair understanding on your part.

Examiner McGrath: That was not the impression you intended to convey by the repeated answers to questions on cross-examination that you relied——

Mr. Kern: No, sir.

Examiner McGrath: —In justification of the schedules upon what the Commission said and did in the previous Coke Proceeding referred to.

Mr. Kern: You will understand in this Coke Proceeding C. F. A. lines felt that an interterritorial level of rates higher than that prescribed in it should have been prescribed.

[fol. 355] Examiner McGrath: You did not make that position clear at this time. That is the position is it, of the C. F. A. lines?

Mr. Kern: Yes, sir.

Mr. Keeler: Right on that point was the evidence introduced in the C. F. A. case dealing or going to this question of whether there should be a different scale prescribed from the South on a different basis from the South to the C. F. A. territory and within C. F. A. territory?

Mr. Kern: Oh, there was a lot of evidence.

Mr. Keeler: So that this scale that the Commission prescribed in that case was not just an idea that originated with the Commission but was based on evidence introduced in that case. Is that correct?

Mr. Kern: Yes, sir.

Mr. Cronk: Since the decision of Docket 3511 there have been motions filed in that case by the Southern interests to reopen that case for the purpose of revamping the order along the lines suggested here to which the C. F. A. lines, which the C. F. A. lines have resisted.

Mr. Kern: There were two I think and both of them were denied.

Mr. Cronk: They were resisted and both of them were denied?

Mr. Kern: Yes, sir.

Mr. Cronk: Showing the attitude of your principals in that matter.

Mr. Kern: That is correct.

Mr. Cronk: And if the Commission should reopen that case for further hearing you would still resist the change in the order to permit the southern carriers to get into this territory on the same basis of rates?

Mr. Kern: Yes, sir.

[fol. 356] Mr. Cronk: Your attitude throughout is that the rates from the overhead rates, from the South should be on a higher basis than the rates within the North?

Mr. Kern: Yes, sir.

Examiner McGrath: Are there any further questions?

Mr. Widell: May I ask then why do you take that position, Mr. Kern, on what grounds are you prepared to say?

Mr. Kern: Section 3.

Mr. Widell: Let me understand. Do you understand my question?

Mr. Kern: Yes, sir.

Mr. Widell: Do you mean that it would be unduly prejudicial to northern shippers unless the rates from the South are on a higher level than within the North?

Mr. Kern: Yes, sir.

Mr. Widell: And that is your only ground of defense if this order should be vacated in Docket I. & S. 3511?

Mr. Kern: So long as our rates within the North are on a reasonable maximum level we feel that Section 3 violations will exist if interterritorial rates are not on a reasonable maximum level.

Exam. McGrath: Is there anything further? Is Mr. Kern to be the only witness for the C. F. A. Lines?

Mr. Donadio: Yes, sir.

Thereupon, there was offered and admitted in evidence Respondents' Exhibit No. 1.

Exhibit No. 2 is a statement showing representative origins and destinations in connection with the adjustment under discussion.

Thereupon there was offered and admitted in evidence Respondents' Exhibit No. 2.

[fol. 357] Exam. McGrath: There are just one or two questions that I want to ask you Mr. Kern. Do any of the suspended rates exceed the distance rates prescribed as maxima from the Southern producing points to Central and Illinois territories?

Mr. Kern: I have been unable to find any such. There are I believe one or two instances where the mileage as far as I was able to check made rates higher than the suspended rate but that is a matter I do not want to make any issue on because the carriers can fix that up after the decision if there are any rates that are not on scale.

Exam. McGrath: Is that true with respect to any of the rates from Chattanooga that any of the suspended rates from Chattanooga are in excess of the scale?

Mr. Kern: I have noticed no irregularities in the suspended Chattanooga rates.

Exam. McGrath: Well is it your purpose to justify rates from the Southern producing points that exceed the rate in the scale prescribed in the decision in I. & S. Docket 3511?

Mr. Kern: No, sir.

Mr. Norman: On your Exhibit No. 2 those instances where the suspended rate is blank, take the second point on the Exhibit, Cleveland. The rate in effect March 14, 1934—603 and the present rate is made effective March 15, 1934, $5.00, I. & S. Column 3 rate would be $5.00 and your suspended rate is blank.

[fol. 358] Mr. Kern: There is no suspended rate. Five dollars is the present rate. You got a $1.03 reduction as a result of this scale.

Exam. McGrath: That rate became effective March 15, 1934.

Mr. Kern: Yes, sir.

Mr. Norman: The prior rate was the combination. It is marked ("C").

Mr. Donadio: Respondents rest.

Exam. McGrath: What is the position briefly of the Southern carriers?

Mr. Mohr: That the present rates should be continued in effect, that the tariffs should be cancelled.

Exam. McGrath: Mr. Mohr, do you speak for all of the Southern carriers, respondents?

Mr. Mohr: Yes, sir, in that regard, the statement I just made, they all concur in that statement.

Exam. McGrath: I will inquire again if the shippers supporting the suspended schedules have any testimony to offer?

Mr. Cronk: No sir, none at this time.

Exam. McGrath: All right, protestants may proceed. I assume the carriers protestants will go first. Is that correct?

Mr. Clark: Yes, sir.

[fol. 359] F. H. Behring, called as a witness in behalf of the southern carriers protestants, having been duly sworn testified as follows:

I am Commerce Agent of the Southern Railway System lines. I have been with the Southern Railway continuously since 1899, in the traffic department.

Exhibit No. 3 is a statement of four pages showing the rates between points within the South compared with the C. F. A. scale of I. & S. Docket 3511. The stations are shown by states. The destinations are those with a population of 5,000 and over, so that there has not been any hand-picking of the points to be shown. It gives a complete picture of the coke rate adjustment in the South.

At the previous hearing it was shown that the rates in the South were lower than in C. F. A. territory, but this statement which shows points in all southern states indicates in the general average on page 4 that the rates in the South average exactly the I. & S. 3511 C. F. A. scale.

It would seem proper with that showing that the rates from the South to Central Territory might reasonably be not higher than the scale applying in Central Territory, since that scale for distances over 70 miles has been ad-

vanced considerably, as I will later show, for distances over 300 miles.

[fol. 360] It is likewise true that there are lower rates in some states of the South and at the Ohio River, but the circumstances which made those rates low was the matter of competition. Take for example the rates to the Ohio River, this Commission in "Coke Rates from Kentucky, Tennessee and Virginia to Cincinnati Group," from Southwest Virginia, Benham, Kentucky, and Chattanooga, Tennessee, I. & S. 2216, 93 I. C. C. 572, decided December 31, 1924, refused to allow the L. & N. and others to advance the present 259 rate to 290, comparing that rate with the rates from C. & O. West Virginia ovens and ovens in C. F. A. territory.

The rates to New Orleans, Baton Rouge, etc., were likewise treated by the Commission. The rate to Baton Rouge, Louisiana, from Dolcito Junction, Alabama, in the Birmingham Group was approved in Docket 19242, 140 I. C. C. 438, decided March 21, 1928, and the rates found not unreasonable.

To Mississippi Valley points the Commission prescribed coke rates at twenty-five cents higher than the coal rates, some of the latter having been advanced in the same hearing, Docket I. & S. 569, 56 I. C. C. 187, decided July 22, 1915, and to points on the Illinois Central and Y. & M. V. the Commission gave relief from the depressed points in Fourth Section Application No. 12645 et al., 129 I. C. C. 197, decided June 27, 1927.

The only other case affecting the measure of the rate was to Chicago from Southwest Virginia, where the Commission prescribed 250 in Docket 3771 et al., 39 I. C. C. 523, decided May 23, 1916, before the advances and reductions were applied to the rates.

The general average, however, of all of these rates produces exactly the same average rate as the C. F. A. mileage scale in I. & S. 3511 produces.

[fol. 361] Exhibit No. 4 is a statement of present rates on coke from Chattanooga and Birmingham to typical consuming points in central territory, showing the short-line mileage and the present rate and comparing the same with the central territory I. & S. 3511 scale. I have also shown the rates under the interterritorial scale prescribed from southern points to the same destination as information.

The rates prefixed with a (*) were 25 cents per ton over rates the carriers had subsequently issued via other routes and were made to cover misrouting and expired on a fixed date.

I would like to cut out the rates from Appalachia in this exhibit. I understand the L. & N. to whom I sent an advance copy to check those rates found the rates were different in a number of instances. I want those eliminated and just have the Chattanooga, Birmingham and Alabama City rates. The L. & N. will give those rates; they have an exhibit.

Exhibit No. 5 shows a comparison of the C. F. A. scales, former and as prescribed in I. & S. 3511, and the amounts of advances and reductions at various mileages. These figures are taken from the Commission's opinion in I. & S. 3511 and are shown in Appendix 3 (former rates) and Appendix 8 (I. & S. 3511). The exhibit shows that the scales cross between 70 and 100 miles, actually at 81 miles, the rates below that distance being reductions and over 80 miles the rates are all advanced, increasing as the distance increases. As indicated by the context of the Commission's report in 194 I. C. C. 640, in its conclusions, the scale was advanced for the longer distances to remove the prejudice or disadvantage against the short-haul producer. This [fol. 362] works alike against the C. F. A. long-haul producer as it does against the Southern producer, only in that the Southern producer has a minimum distance to the Ohio River crossings of over 300 miles, and the advance for that distance is 31 cents. That minimum is from Chattanooga, while at 700 miles, which is greater than any C. F. A. distance, the advance is 78 cents. The interterritorial scale prescribed in 3511 adds 30 cents at 300 miles and 45 cents at 700 miles, an additional handicap to the Southern producers for their longer mileages.

The distance from Chattanooga to typical Michigan points run from 583 miles to 799 miles, and from Birmingham to the same points from 691 to 809 miles, the rate increase increasing with the mileage. Maximum mileage shown in Appendix 3 for the present central territory scale stops at 740 miles, with a 78 cents increase.

Exhibit No. 6 is a statement of two pages of rates and mileages on coke from Chattanooga, Tenn., and Birmingham, Ala., to typical consuming destinations in central terri-

tory compared with the rates and mileages to the same destinations from typical central territory producing points. It shows the fact that the minimum distance from southern producing points is affected by the haul of over 300 miles before the Ohio River is reached, while the distances are generally and with few exceptions shorter from C. F. A. points, so that even the longer haul rates in central territory are favored by the longer hauls from the South.

[fol. 363] The interritorial scale would show still greater disadvantages on the part of southern producers.

The general averages of mileages and rates are shown at the end of the exhibit, and show:

Chattanooga for 548 miles average has average rate of 394.

Birmingham for 643 miles average has average rate of 428 and in C. F. A. territory the lowest is Toledo and the highest average Steubenville, Ohio:

Toledo for average 196 miles has average rate of 236.
Steubenville " 329 miles has average rate of 302.
The advantage of Toledo under Chattanooga is 158¢ in rate.
" " " Steubenville under Chattanooga is 92¢ in rate.
" " " Toledo under Birmingham is 192¢ in rate.
" " " Steubenville under Birmingham is 127¢ in rate.

With those general averages of the rates against them it is apparent that any additional differential or amount superimposed on the C. F. A. scale would preclude any movement from the South as against any of the C. F. A. origins shown.

The "proposed rates" shown in Exhibit 6 are rates that we propose. Our proposal is to apply the C. F. A. or column 2 scale from the South to all destinations in C. F. A. territory.

[fol. 364] Exhibit 7 is a comparison of the C. F. A. coke rate earnings for distances of 300 miles and over up to 800 miles, compared with the rates and earnings per car on Processed Asphaltic Limestone made under the interterritorial scale prescribed by the Commission in Docket 25059, 194 I. C. C. 273, and with Asphaltic Limestone prescribed in Docket 23336, 174 I. C. C. 343, to show that the rates and earnings per car on Asphaltic Limestone justify the

C. F. A. territory scale as reasonable for the move
of coke from southern territory to C. F. A. territory

Mr. Day: Right there, I want to make another obje
that this exhibit and the extent that the witness testi
in connection with it are so broad as to take in all o
C. F. A. territory instead of being limited to the p
involved in the suspended tariffs.

Mr. Behring: Well we had to show a picture of the w
C. F. A. territory to show how it works.

Mr. Clark: It is a comparison of the exhibit. The
generally you show it, it seems to me the more ful
would be as a comparison.

Examiner McGrath: Irrespective of what the ex
shows, the issues of course are limited to the sche
under suspension.

Mr. Orcutt: But as I understand it the rates; he is
proposing a scale of rates.

Mr. Clark: The proposal is limited to the points invo

Mr. Orcutt: There is nothing to indicate that. He h
scale under "Proposed Rates, and Revenue Per Ca
Coke." There is nothing in the issue here that woul
title them to go into that.

Examiner McGrath: Explain for the record what
mean by "Proposed Rates on Coke." That question i
clear from the exhibit. The proposed rates strictly sp
ing are those under suspension.

Mr. Behring: The proposed rates so far as the tar
concerned would really mean that but a number of t
rates are even lower than this, the scale of the C. F
[fol. 365] and there would be advances and reductions i
C. F. A. scale if the C. F. A. scale was applied to the e
territory.

Examiner McGrath: That is not entirely clear. By
posed rates you mean rates based on the C. F. A. scale
not the rates under suspension?

Mr. Behring: That is correct. I wanted to justify
present coke rates by a scale and I did not name any p
in this as to C. F. A. destinations as it would naturally a
to the tariffs under suspension.

Mr. Orcutt: Are the rates in Column 2 here then
C. F. A. Scale?

Mr. Behring: These rates you mean?

Mr. Behring: Yes, sir, that is the C. F. A. Scale.

Mr. Orcutt: That should be labeled C. F. A. Scale instead of "Proposed Rates," shouldn't it?

Mr. Behring: C. F. A. Scale is what we are proposing as reasonable bases.

Mr. Orcutt: Well then we must object, Mr. Examiner, because there is no issue here by which the Commission could substitute any rates for these here under suspension [fol. 366] and a proposal of a scale to substitute for those rates is clearly not proper evidence and is inadmissible.

Mr. Norman: On the contrary, Mr. Orcutt is entirely wrong about that because the Commission constantly considers suspended rates and says they are not justified and themselves authorize without prejudice the publishing of rates not in excess we will say of the "Following Scale." They do it all the time. If we came here and did not tell the Commission what we think about it we would not be playing fair with the Commission.

Mr. Holopeter: I would like to support that objection and exception of Mr. Day and of Mr. Orcutt for the reason there is no issue involved here except as to the rates under suspension. There is nothing I can find in any of these exhibits that designate those rates under suspension. Perhaps the exhibits will be used for comparative purposes but there seems to be nothing in the witness' testimony to show that he is going to give us the suspended rates at any other time to compare with these rates. I think the exhibit is entirely beyond the issue.

Mr. Behring: I don't know whether any other witness is going to put that in or not but I was not expecting to go on first.

Mr. Norman: As a matter of fact, Mr. Examiner, this objection came up in connection with Aurora and my attention has been called to Supplement No. 8 of Speiden's Tariff 305-B and apparently Aurora is in there. All of the points are in there except the local points on the Illinois Central.

[fol. 367] Mr. Day: There are a number of others, Indianapolis for instance.

Examiner McGrath: You are at liberty to point those out, Mr. Day, in rebuttal.

Mr. Day: I did not want Mr. Clark to get the impression I was simply calling attention to Aurora and treating that as the only case where there is no change in the suspended tariff.

Mr. Mohr: I think Mr. Day has in mind the rates from Birmingham perhaps whereas the rates from Chattanooga to Aurora are both in the suspended tariff.

Mr. Behring: I said Birmingham when I was discussing Exhibit No. 6.

Examiner McGrath: The essential or basic issues here are the lawfulness of the proposed rates, isn't that correct?

Mr. Day: That is right, the suspended rates.

Mr. Clark: The suspended rates.

Examiner McGrath: Yes, the suspended rates.

Mr. Cronk: What he has done is to propose a basis of rates to a great many points that are not involved and are not under suspension and it seems to me that the whole line of Exhibits with the possible exception of 3 and one other one are very confusing and throw no light on this case whatever. The Examiner could not tell anything about what he is called upon to decide by examining these exhibits and neither could any of the parties and they are [fol. 368] merely making their proposal here as the witness stated to put in the C. F. A. Scale from Birmingham and Chattanooga to all destinations in the C. F. A. Territory. That is not involved in this case, it has been decided and the Commission has refused to reopen it, it is a closed book and it cannot be broadened out in this case to encompass any such proposal as that. It seems to me the whole series of exhibits is rather confusing and ought not to be accepted.

Examiner McGrath: Are these rate comparisons offered to show that the suspended rates are unreasonable, is that the purpose of them?

Mr. Behring: Some of the suspended rates are higher than we think is a reasonable maximum scale.

Mr. Norman: I think that this witness and everybody else had a right to suppose that the people that were here to justify these tariffs were going to show what the suspended rates were and if they had followed the ordinary procedures that is followed in such proceedings instead of jockeying around here the way they have those rates would already be in this record and this witness has a right to expect that those rates would be in this record.

Examiner McGrath: That is true but we also want this witness to make clear his position with respect to the rates under suspension.

Mr. Keeler: Mr. Examiner, I think as an illustrative point, take Cleveland, Mr. Behring, as I understand it——

[fol. 369] Examiner McGrath: I did not intend to open up the case now for cross-examination.

Mr. Keeler: I just wanted to clear this up. Reference is made to Aurora, and I just wanted to call attention to Cleveland which is a very important destination as illustrative of the situation. The present rate is $5.00 to Cleveland, which I am told is not under suspension from Birmingham. The proposal here is to establish to Cleveland a rate of $4.55. It seems to me this would be very confusing to the Examiner and the Commission, this mass of stuff that no one can tell what rates are under suspension, what rates are at issue or anything else. It is an attempt to re-try Docket I. & S. 3511.

Examiner McGrath: Can you undertake to go through that when you complete your direct testimony and come back on the stand and select the rates which are under suspension.

Mr. Behring: I could not without going right through the tariff. They are on the roads that have withdrawn their concurrences.

Examiner McGrath: Just take that rate Mr. Keeler referred to, $5.00.

Mr. Behring: Yes, sir.

Examiner McGrath: That is the present rate as I understand to Birmingham?

Mr. Behring: Yes, sir.

Examiner McGrath: And that is also the interterritorial scale rate, $5.00?

[fol. 370] Mr. Behring: It happens to be, yes sir.

Examiner McGrath: Do you understand that rate was suspended, that interterritorial rate of $5.00?

Mr. Behring: I understand every rate in the tariff was——

Examiner McGrath: Including both rates that may be increases——

Mr. Behring: May be increases or lowered, yes.

Examiner McGrath: —or reductions, or no change made.

Mr. Behring: Yes, sir.

Mr. Day: The only rates suspended were the increases from the southern points. The reductions—and there were a great many of them, that followed the decision in Docket 3511 were permitted to stand. There was no re-opening as to those rates.

Mr. Day: The southern shippers and railroads asked the Commission to reconsider and to rehear I. & S. 3511 as to all of the rates, and those petitions were denied. The tariffs under suspension merely carry out the provisions of Docket I. & S. 3511 in establishing a uniform basis of rates to all C. F. A. destinations from these southern origins. The only rates you have under consideration in these proceedings are the rates that were suspended.

[fol. 371] Examiner McGrath: The Examiner's understanding is that the Commission suspended the schedules, the proposed schedules, irrespective of whether they made increases or reductions, suspended the entire schedules. Let me support that by reading a provision of the original I. & S. Order "It further appearing the said schedules have made certain increases and reductions in rates for the interstate transportation of coke" and so forth.

Mr. Norman: I don't think they did make any reductions.

Examiner McGrath: "It is ordered the operation of the said schedules contained in said tariffs and concurrences be suspended." That is the reason I stated in the opening, and nobody took exception to it, that carriers proposed to revise the present rates and did not limit my statement of the issues to the increases. If I am wrong about that I want to be corrected.

[fol. 372] Mr. Day: This is the situation, Mr. Examiner, we filed tariffs after the Commission's decision was handed down in which we brought to the level of the scale fixed in Docket I. & S. 3511 all of the rates from southern territory that were higher than that scale basis, and all of the rates within C. F. A. territory whether they were higher or lower than the level of the C. F. A. Scale. To take effect at the same time the Northern lines had requested the southern carriers to readjust their rates from Birmingham and Chattanooga and these southern producing points so as to reflect the same uniform level where the rates were lower as well as where they were higher. The southern roads declined to take any action with respect to the rates that were lower than the scale. They left them in effect so that the northern railroads were forced to go to the Commis-

sion with petitions or applications to cancel their concurrences in the rates from the South to the extent those southern rates were lower than the scale. That forced action on the part of the southern carriers finally to bring up these rates that were lower to the scale basis and it is those rates that were suspended finally and that are under investigation here. They involve, as I understand it, only increases, the reductions having already been made last March when the northern carriers did everything in their power to effect compliance with I. & S. 3511 decision.

Mr. Norman: I think that is correct except of course I do not agree with his conclusion about compliance with Docket 3511 Order but I think it is correct that in March the rates that violated the Order in Docket 3511, which said they were unreasonable to the extent they exceeded the scale, were reduced to this scale level.

Examiner McGrath: Those rates went into effect.

[fol. 373] Mr. Norman: They went into effect. Then these tariffs were filed in compliance with the cancellation of the concurrences which brought up to the level of the maximum scale the rates that had been below that so that I think these rates are all increases that are here under investigation.

Mr. Behring: As a matter of fact the Chattanooga rates were never under attack.

Mr. Holopeter: If you will note, the order suspending them suspends only Supplements No. 8 to I. C. C. 1770 and Supplement 6 to I. C. C. 1797. The original tariffs, 1770 and 1797, went into effect March 15, 1934, and the Supplements are indeed very small. There are relatively few rates in these Supplements out of these tariffs that are suspended. It is only the Supplements suspended and the rates in the tariffs are in effect.

Examiner McGrath: That being so should not Mr. Behring take some time if necessary to go through the exhibits and pick out the points that are really involved here instead of undertaking to cover matters that are not before us here?

Mr. Clark: He could do that very easily, Mr. Examiner. When you show them that way with an explanation it seems to me it would be very easily understood. I don't think anybody could be mislead by the exhibit in the present form. I wish to say now I am glad to accept the statement of Mr. Day and Mr. Norman. Frankly I didn't know enough about it to know which was right.

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to you, Mr. Orcutt?

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tain routes will apply in connection with f
suspension, whereas the old rate has more
Consequently there is an increase and it is
subject of dissension as it would throw it
old tariff with the selection of routes.

Examiner McGrath: Mr. Behring will su
information so that will be clear.

Mr. Behring: I was talking on Exhibit No.
heavier loading of Asphaltic Limestone con
the lower rate thereon and equalizes the
earnings.

[fol. 376] Exhibit 8 is a statement showing
rates on coke, carload, from Birmingham, A
Chattanooga, Tennessee, to typical points of
in C. F. A. territory, showing, first, the mile
class rate, and the rates shown in this exhibi
posed rates are the rates which we propose;
the suspended rates. The rates we propose ar
scale. We stuck to the C. F. A. scale all the w
showing a comparison of the rates under tha
the super-imposed scale for interterritorial
Exhibit No. 8 also shows proposed rates on c
[fol. 377] cent the coke rates are of first-clas
the per car revenue on the average loading show
ern territory in I. C. C. Freight Commodit
compared with rates and car revenue on culle
by the Commission in I. & S. Docket 3459; rate
car revenue prescribed in I. & S. Docket 30
rates and car revenue approved and dismisse
Docket 3460; and paper stock rates and car
proved and dismissed in I. & S. Docket 3480,
tances, to the same points of destination—al
torial rates.

The percents of first-class, it will be seen fr
line of the Birmingham and Chattanooga state
the following averages:

From Birmingham, on coke for 643 miles, 11
first-class, with per car revenue of $147.53. O
per cent of first-class, or 27 cents average rat
car revenue of $160.62. On hay, 45 cents, or 2
and per car revenue $108.19. On charcoal, 22
of first class, or 41 cents, with per car revenue

On paper stock, 30 per cent of first-class, or 36 cents, with per car revenue of $108.00.

From Chattanooga, on coke for 548 miles, 11.9 per cent of first-class, with per car revenue of $136.07. On cullet, 25 cents average rate, with per car revenue of $146.96. On hay, average rate of 41 cents, with per car revenue of $99.24. On charcoal, 37 cents average rate, with per car revenue of $104.21. On paper stock, 33 cents average rate, and per car revenue of $99.06.

These are all low grade commodities with lighter loading than coke, while the previous exhibit showed commodities [fol. 378] of greater loading than coke. Hay is an agricultural product and therefore subject to special treatment by reason of that fact.

The percentage of first-class on coke is lower than the other commodities, but in this long haul movement and its higher loading produces an average revenue which would indicate that the proposed application of the C. F. A. scale makes for a reasonable maximum rate for the same mileage service between the points in interterritorial movement. All of the scales have had the approval or prescription by the Interstate Commerce Commission.

[fol. 379] I think the exhibits I have filed and the explanation in connection therewith demonstrate the reasonableness of the proposed C. F. A. scale for long distances from the South under the scale which has been shown to protect the short haul shippers, and does not interfere with the long haul shippers in C. F. A. territory at any points except those near the Ohio River and lower part of the Mississippi River, where in a few instances the mileage from the southern producing points may as a matter of geography be less than the longest distance producer in C. F. A. territory who would have to meet long haul points of a great deal less distance in its own territory. By long haul I refer to three hundred miles or over, although the Commission in I. & S. Docket 3511 went below that figure for the long haul scale.

I have nothing further to add, except I want to speak of Chattanooga.

Mr. Orcutt: May I call attention to the last statement as being illustrative of the immateriality of his testimony? We will admit the C. F. A. scale is not more than a reasonable scale, the question of the reasonableness of that scale to this traffic is not at issue here. It is the reasonableness

of the rates here under suspension that is in question. All of his testimony has gone to the reasonableness of the C. F. A. scale which is not in issue here at all.

Mr. Norman: The reasonableness of it as applied from the South.

Mr. Orcutt: We will admit it is no more than a reasonable scale.

Mr. Norman: As applied from the South.

Mr. Orcutt: As applied from anywhere.

Mr. Clark: All he is asking to do is to have the right to apply it from the South. If you admit that is reasonable to apply——

[fol. 380] Mr. Orcutt: That is not the issue. He is *speaking* to apply that scale and the issue here is as to the reasonableness of the rates under suspension.

Examiner McGrath: I think the Examiner has stated the issue before, according to his understanding. Are there any further questions on direct?

Mr. Clark: No, sir.

Mr. Norman: I have a few that I suppose will be considered on direct.

By Mr. Norman:

Q. Do I understand from these exhibits that you propose that in lieu of the rates here under suspension reasonable and proper rates to apply would be the C. F. A. Scale 2?

A. Yes, sir.

Q. When you refer to C. F. A. scale you are talking about Column 2 are you not?

A. Column 2 rates, yes sir.

Q. Whereas these proposed tariffs carries from the South the C. F. A. Column 3 rates.

A. Interterritorial rates.

Q. The interterritorial rates instead of the C. F. A. I should have said.

A. Yes, sir.

Q. If I understand your position it is that the Southern carriers have a right to carry scale no higher than that within the C. F. A. Territory?

A. Yes, sir.

Mr. Cronk: Have a right?

Q. And that it is your position that it is necessary to carry that scale in order that your producers may compete in that Territory?

[fol. 381] A. Yes, sir.

Q. Now you are not proposing, of course, any rates to any points other than those to which rates are under suspension?

A. That is correct.

Mr. Norman: I believe that is all.

By Mr. Widell:

Q. Mr. Behring, please refer to your Exhibit No. 3.

A. Yes, sir.

Q. I have one question with respect to that exhibit. Both from Birmingham and Chattanooga to Southern points those rates have been in effect for quite some time, have they not?

A. I don't know of any changes that have been made in them in recent years except as spasmodic rates.

Q. In other words these rates go back many years without any change in the general level except the percentage increases and reductions and so on?

A. That is correct.

Q. Is that correct?

A. That is correct, that is right.

Q. Do you recall of your own personal knowledge the early beginning of the coke rates in Southern Territory, with what they were related?

A. Well they were related to the coal rates at that time when they were first put in but I do not recall whether we had a percentage over them or the same. Some of them were the same and some have been put on a percentage over the coal rates.

Q. Do you know of any movement on hand or any contemplated action looking towards a drastic increase of the general level that you set forth in this Exhibit?

A. I don't think there is any chance for a general increase in the Southern coke rates and I don't know of any [fol. 382] investigation going or looking to that idea of revising our rates. They are liable to be revised downward or upward, according to the circumstances that may surround the specific territory to which it is applied.

Cross-examination. By Mr. Hollopeter:

Q. On your Exhibit No. 6 you seem to be proposing a rate from Birmingham to Terre Haute on page one of Exhibit No. 6 of three dollars, sixty-five cents, is that correct?

A. You say from Birmingham, three dollars sixty-five cents?

Q. You are proposing three dollars sixty-five cents are you for four hundred seventy miles?

A. To Terre Haute.

Q. Is that your proposal?

A. Yes, that is my proposal.

Q. Follow right on then across. How do you account for that rate being so much lower than the rate you show within C. F. A. territory from Youngstown, Ohio to Evanston, Illinois, where you have three dollars sixty-five cents for only four hundred and seven miles?

A. Wait until I get my work sheet and see if that is correct. Youngstown you say?

Q. You show four hundred seven miles with a rate of three dollars sixty-five cents.

A. That is what the rate clerk put in there but——

Q. Was it your purpose to propose a lower rate from Birmingham to Terre Haute than for an equal distance in C. F. A. territory?

A. No sir, the same scale all the way through.

[fol. 383] Q. And what would you propose from Birmingham?

A. Well the scale is three dollars sixty-five cents, the scale rate would be the one we would propose and it should have been in there from Youngstown.

Mr. Mohr: To Terre Haute from Youngstown the distance is the same and the rate shown is three dollars forty-five cents. Would that indicate that the rate shown to Evanston was erroneous and should be three dollars forty-five cents also?

Mr. Behring: Four hundred seventy miles, the scale is three dollars sixty-five cents for that distance.

Mr. Mohr: Should it be "470" or "407"?

Mr. Behring: And "407" would be three dollars forty-five cents. It should have been three dollars forty-five cents for "407" miles.

Mr. Mohr: Is your distance "470" or "407"?

Mr. Behring: It shows "407".

Mr. Mohr: And the rate should have been three dollars forty-five cents?

Mr. Behring: It should have been three dollars forty-five cents. I checked a number of the rates just to see how they worked out but I did not happen to strike that one.

Q. What is the correction then?

A. Three dollars forty-five cents.

All rates used in the comparison on Exhibit 8 are Commission fixed rates. That is also true of Exhibit 3.

Mr. Orcutt: Mr. Behring does your proposal to apply the C. F. A. Scale interterritorially carry with it the willingness to give the C. F. A. carriers their full earnings under that scale and divide the rates on a mileage prorate?

Mr. Clark: That is not proper cross-examination. It is wholly irrelevant to this proceeding.

Mr. Behring: I have nothing to do with divisions.

[fol. 384] Cross-examination.

By Mr. Day:

Q. In proposing the same rate level in the South to C. F. A. as prevails within C. F. A. territory did you give any consideration to relative transportation conditions in the South as compared with the North?

A. No sir I did not, that has been always the favorite proposition of the C. F. A. lines whenever they come to working across the border, as it was in the export and import adjustment and has been in everything we have had since that case. We feel that competition has more to do with it and further, the C. F. A. scale has been boosted up so high on the long end of it that we run our differentials over by reason of the excess mileage we have to carry to a point where it can become pretty hard for our people to meet the competition at all.

Q. Will you agree with the statement made time after time by the southern railroads that transportation conditions in the South are more difficult than they are in C. F. A. territory, more expensive?

A. No,—because of a lack of density. The density calls for more revenue as a rule but we never will get density

for our coke business and iron business and other things if they are muzzled so we can not get the density.

Q. The fact that the transportation conditions are more difficult in the South and more expensive——

A. No I would not say more difficult.

Q. —calls for a higher rate level in the South or for transportation in the South than in C. F. A. territory, does it not?

A. No I don't think that as a general proposition because we handle lumber cheaper than you can possibly do it in your territory and we handle a lot of other commodities where we have volume because it moves in very nearly train loads.

[fol. 385] Q. Is it your idea——

A. We have rates in the South that are lower than the C. F. A. territory because of that condition, the Commission has made it so.

Q. Is it your understanding and contention here that transportation conditions in the South are just as favorable as they are in Central Territory?

A. When you say transportation conditions I don't know whether you refer to operating conditions or not.

Q. Yes I am talking about——

A. Just operating conditions? We have places in the South and on our own lines where you can carry it as cheap as you can; that is the C. N. O. & T. P. from Chattanooga to Cincinnati.

Q. There may be pieces of track that are better and where transportation can be performed for less cost but taking the two territories by and large isn't it a fact that transportation conditions are more arduous and more costly in the South and require a higher level of rates?

A. They are not more arduous it is more expensive by reason of lack of density.

Q. Does mere lack of density——

A. By reason of the lighter trains.

Q. Therefore it requires a higher rate level to sustain it?

A. No we don't require a higher rate level to sustain it. The higher rate level is applied to certain things. It is applied to class traffic which can stand it.

Q. Is it your position that the transportation conditions so far as coke are concerned from either Chattanooga, Birmingham or any of these other southern producing points

are just as favorable for the haul within Southern territory as they are for the haul within Central territory?

[fol. 386] A. I do. I think Chattanooga to C. F. A. territory, and Birmingham to C. F. A. territory, the conditions are just as good as yours in your own territory.

Q. There is no reason why there should be a higher rate level for any special favors given to the southern railroads in the matter of revenue on coke from the South to C. F. A. territory?

A. I don't understand that question. But here is what I am trying to give you. It is a question of getting the traffic moving and when we have to meet competition it is a competitive adjustment and the transportation has not a darn thing to do with it, you have got to get the freight through or you don't get anything.

Q. Mr. Behring, the southern railroads in their cases, including witnesses of the Southern Railway Company, and I think yourself among them, have taken the position from time to time that the transportation conditions in the South are, bear about the ratio, so far as difficulty in expense and inconvenience are concerned, of about anywhere from 122 to 200 to 100?

A. You have never heard me say that nor any other Southern Railway officials, about the troubles we have had. The ratio of our population and tonnage would warrant rates of about 122 per cent or something like that higher. But it is not the transportation conditions. We can carry the freight as fast as anybody but we don't have the tonnage to make a full train like you do all over the entire South. That is the average of the entire South where we have a lot of farm territory, and nothing being produced.

Q. Hasn't the Commission held in passing upon these movements——

A. Mountain territory.

[fol. 387] Q. —from the South to the North that a mile of transportation in the South is equivalent to about 1.8 miles of transportation in C. F. A. or Northern territory?

A. They have on some things but not on generally heavy commodities because they are carrying coal and we are carrying lumber, we are carrying livestock just about as cheap as anybody in the country.

Q. In the pending general division's case aren't the

southern railroads taking the position that on coke among other commodities——

Mr. Clark: That is not cross-examination.

A. I don't know anything about the general division's case.

Mr. Day: This witness has made a proposal.

Mr. Clark: He has not said anything about the general division's case in his testimony.

Mr. Day: I'll grant you he has not but he has made a proposal of rates exactly the same in amount as apply within our Territory. I want to find out the basis for his contention that such rates can properly or reasonably be applied from the South.

Examiner McGrath: Answer the question.

A. Looking at the asphaltiv limestone adjustment the Commission made that, and it is lower than your rates in your territory.

Q. That is the fact as I have stated it isn't it?

A. It is not the way you stated it.

Q. That in the General Division's Case the southern railroads are not asking——

A. I don't know what they are asking in that but that is the whole Southern Territory as against that.

Q. On all commodities, coke was dealt with along with the others?

[fol. 388] A. I don't know whether it is or not. I don't know what the Division's Case covers.

Q. If it is a fact that one mile of transportation in the South is equivalent to 1.2 miles, or 2 miles in the South then that is a circumstance that should be given consideration in determining the level of the rates on coke to be applied from the South to C. F. A. Territory in this case, is it not?

A. If that is what they put in on coke. But they would not put it in on coke because coke is produced at Chattanooga and Birmingham, the two points that have the best service to the Ohio River anywhere in the South or North.

Q. You cannot pick out certain sections of line of particular railroads can you?

A. Oh, that is the place where this stuff originates and goes and moves over that route:

Q. Yes, but it moves over a number of southern railroads.

A. The Southern Railway System Lines, just like the Big Four and the New York Central.

Q. When you go to the Commission and ask for them to give you a proper proportion of the coke rate you do not rely on the favorable transportation conditions obtaining on these particular pieces of particular railroads do you?

A. No. When you are taking the South against the North it is a different thing entirely from the mere commodities produced at one place as against another.

Q. That is what you are discussing here?

A. Yes where the conditions would warrant our doing it. But I do not think the transportation conditions have a darn thing to do with the operation of the competitive rates. [fol. 389] Q. You think transportation conditions should be ignored here?

A. No, I am talking about transportation conditions in making the rate to meet competition. You cannot use it, you should not put 122 per cent on things that you have got to reduce to 78 per cent in order to move them.

Q. Isn't it a fact competition, making rates to meet competition can only be the voluntary act of the railroads when it comes to forcing the rates of the railroads, the Commission is bound to consider the transportation conditions?

A. I don't know anything about anything being forced on you.

Q. Aren't you attempting to force a certain level of rates on the northern railroads?

A. No, I am just saying they are a reasonable set of rates that should be applied and showing also the handicap even under that arrangement against our coke producers.

Q. You do admit the Commission should consider transportation conditions in fixing the rates?

A. I don't think they should consider anything when competition comes in, transportation does not control.

Q. They should not consider transportation conditions?

A. No, sir, they should not because they didn't do it in the Ohio River, the Big Stone Gap rate.

Q. All right. Now will you turn to your Exhibit No. 8? Tell us why you selected such light loading commodities as paper stock, charcoal, and hay to compare with a commodity like coke, that you say loads to around sixty-nine thousand pounds per car?

A. I told you on Exhibit 8 that I used all of the commodities, through scales of low grade commodities that the Com-

mission had prescribed from the South into the Central Freight Association or vice versa and in the asphaltic limestone adjustment I took the other scale which was heavier loading. I wanted to show both light loading and the heavy [fol. 390] loading and those are the only scales we have on low grade commodities.

Q. These are the only low grade commodities that you could find as having been passed upon by the Commission?

A. The Commission has prescribed from our territory into this, or your territory, into our territory.

Q. You are not familiar with the case in which the Commission fixed the cement rates?

A. The cement rates, I did not figure on those at all.

Q. They would have produced much higher earnings than you show for hay or paper stock.

A. I didn't know that the Commission had made them until. Wait a minute, let's see if I have got it. No, I don't have cement in my list. We did not check cement, and I did not understand we had a through scale.

Q. You don't include brick rates among the interterritorial rates that you compared?

A. The brick rates are much more valuable than coke.

Q. Brick answer brick. About five dollars to twelve dollars a ton isn't it?

A. Common brick?

Q. The general brick list.

A. I thought the general brick list was much higher.

Q. And you did not attempt to, or do you know what the relative level of the rates fixed on cement interterritorially between the North and South is as compared with cement within C. F. A. Territory?

A. No, I do not.

Q. You don't know it is much higher?

A. I unfortunately left my book at home from which I got the record.

[fol. 391] Q. From your broad knowledge of rate adjustments do you not know the interterritorial cement rates are much higher than within C. F. A. Territory?

A. No, I do not, I do not know it, at least I don't recollect it.

Q. Haven't there been decisions on asphaltic limestone from southern points into Official Territory more recent than those you show in your Exhibit No. 7?

A. I think I have got the last one and that refers to this. I think the Commission decided a case that I was interested in not very long ago.

Examiner McGrath: Are you familiar with that, Mr. Behring?

Mr. Behring: No, I had those out but I did not familiarize with that.

Q. You do not show that particular one?

A. No, that is the last we have.

Mr. Norman: That is where the Commission awarded reparation on the same basis.

Examiner McGrath: If you have something else to show you can do that.

Q. I am quoting at 194 I. C. C. That is the last decision on the limestone?

A. That is the last I have there?

Q. Yes.

A. That is about as late as it can be.

Q. 194?

A. Yes, they are on two hundred and something right now.

Mr. Day: That is all I have.

[fol. 392] Examiner McGrath: Are there any further questions on cross-examination? (No response.) Mr. Behring, do you consider that the proposed rates, the suspended rates would be unreasonable, or would be reasonable per se?

Mr. Behring: The suspended rates where the maximum scale is——

[fol. 393] Examiner McGrath: Yes.

Mr. Behring: That is the interterritorial scale?

Examiner McGrath: Yes, the rates under suspension.

Mr. Behring: Well, I don't think they would be unreasonable per se but I think they would be too high to allow any business to move relative, with relation to the movement from the short haul and long haul points in Central Freight Association Territory.

Examiner McGrath: That is to say judged alone by transportation conditions you would not regard them as unreasonable per se?

Mr. Behring: No, I would not regard them as unreasonable per se.

Examiner McGrath: Would the Commission be correct in concluding from that that your proposal to establish the C. F. A. scale in the South contemplates rates somewhat less than maximum reasonable rates, transportation conditions considered?

A. No, I think just transportation conditions considered, it would probably be a little less than a maximum reasonable rate. I would not say that the interterritorial scale as prescribed is unreasonable because I believe in higher rates myself but if it does not move the business you might as well not have had high rates.

Examiner McGrath: In other words your position is that rates no higher than the C. F. A. scale from southern producing points to these destinations and in central and Illinois territories are necessary to move the traffic?

Mr. Behring: Yes, sir.

Examiner McGrath: From those origins in competition with traffic from central territory?

Mr. Behring: Yes, sir.

[fol. 394] Examiner McGrath: Traffic from producing points in central territory to the same destinations?

Mr. Behring: That is right, because I have shown the difference in our mileage has created an additional spread because of the protection of the short haul in C. F. A. territory as against their own long haul. They have advanced the rates so much as to put us out of business.

Examiner McGrath: Are there any further questions? (No response) Exhibits 3 to 8 inclusive are received in evidence.

(Thereupon Exhibits 3 to 8 inclusive, Witness Behring, are received in evidence.)

Mr. Widell: May I follow that with one question to the witness.

By Mr. Widell:

Q. Is it a fact, Mr. Behring, that the transportation burden in the South is differently distributed from that in the North on specific commodities?

A. On all commodities there is a difference in transportation burden because I have made comparison with the Interstate Commerce Commission's list and it shows that

they have a great deal more of one than we will have and we will have more of another than they will have.

Q. Do not your exhibits, particularly your Exhibit No. 3, show then that so far as coke is concerned that what may be true of class rates or other high grade traffic is not true of coke, that is as to the rate level, your coke rate level in the South is just as low as it is in the North?

A. Yes, it is.

Q. And always has been?

A. And always has been, as long as I have known about it.

[fol. 395] C. S. Bissell testified for the Southern Protestants as follows:

Direct examination.

By Mr. Widell:

I am President of the Black Diamond Coal Mining Company, Sales Agent for the Tennessee Products Corporation on Coke who are producers of coke, owners of coke ovens and producers at their Chattanooga By-Product Ovens.

In the sale of coke in Chattanooga we have all the way from foundry coke to heating coke, nut coke, egg coke, all of the sizes that go into the market, including everything from domestic to foundry. Included in that there would be what is called industrial coke. In other words there would be the three grades generally, foundry, industrial and domestic. We do not sell any furnace coke. From what I know of southern markets, both foundry, industrial and domestic markets, there is not sufficient consumption in southern territory to match the production of coke in southern territory but that would not be the determination of the market. We feel that we have a right to go anywhere with coke that we can meet the competition. But to answer the question directly, it has not the market there. In other words, after we have sold, generally, as it were, all of the coke we could sell in the South we would still have very much left. The territory involved here, parts of Ohio, Indiana, Michigan and so on, are generally considered as a normal market for southern coke. Actually I know of course of coke being sold and moved to that territory. In the

markets involved here in the North, I am generally familiar with the competition and the commercial conditions. After selling all the coke that could be used in the South we would have some left.

[fol. 396] The more important markets we have reached and could reach in the North are the southern Michigan and Detroit areas, principally, centering around Detroit and Chicago and of course following a line from Chattanooga right up through northern and southern Indiana, southern Michigan and southern Illinois. We have difficulty in reaching Detroit on the present freight rate. It is only during the time when the price of coke there reaches its maximum, in the winter time, that we can enter that market at all on the present rates. I understand that the suspended schedules involve a heavy increase say to Detroit. I don't know exactly what they are. Any increase would simply—well it might just as well be anything because it would shut us out.

Q. What percentage of foundry coke could you expect to sell in the North, that is what percentage would be foundry and what percentage domestic, based upon your past sales experience in the North and what you think would apply for the future.

A. I can only speak for the Chattanooga ovens. I do not believe that the shipment of foundry coke into the North would be over five per cent of the movement of coke into the North. The rest would be domestic or possibly industrial. The bulk of the coke of a by-product operation from Chattanooga to the affected territory in the North would be domestic coke, for house heating and so on.

[fol. 397] As to whether I recall say for instance at Detroit today what we would have to sell domestic coke for, in the present Detroit market that is to say as of September first, there is a variation of fifty cents as between egg and nut, as to those two grades in the Detroit market. But $5.75 to $6.25 are the present prices. The highest figure is $6.25. I believe that is the top-notch price on domestic coke at the present time in Detroit. That is not the wholesale price. That is the price to the dealer and is what the Detroit producer of coke like Ford and Semet-Solvay delivers to the dealer in Detroit for. As to whether we could get more than $6.25 generally, it is very difficult to get that with the

heavy freight rates which we have. Our competition in Detroit is from Ford and Semet-Solvay, two local producers. . There are other northern producers that reach Detroit. There has been Bee-Hive coke coming in there. But the market price is set by the Semet-Solvay and Ford producers. We are not having any movement from Chattanooga to Detroit on the $6.25 price. The present rate from Chattanooga to Detroit is $3.65, so if we are to sell at Detroit at the present time our net at the oven in Chattanooga would be $2.60. We could not and would not sell for that price. We have nothing to do with making the [fol. 398] prices at Detroit. I don't think Birmingham makes them. We find the price set when we enter the Detroit area. The local producers there begin in the Spring and deliver to the dealers on a fixed scale and they absolutely control the price or set the prices in that territory, which is the natural thing. I am an experienced coal mine operator, too. We mine coal that goes into the manufacture and production of coke, so that I am reasonably familiar with the present character of the cost in southern territory in the Birmingham and Chattanooga districts. There has been a decided change in the past two or three years in the character of these costs. Under the N. R. A. and the Union scale that we have now the greatly increased cost has made an entirely different picture in our production costs and in the South, both in Birmingham and Chattanooga on coke. As to whether I find of my own experience and knowledge that that is reflected right straight through to the sale of coke on a more cooperative basis, if I can put it that way so as not to sell too low or to disturb the markets unnecessarily: It has absolutely precluded our invading any other market at all. The yardstick today is the cost, no matter what the stock of coke on hand, the yardstick is the cost of production of coke. I was not selling coke two or three years ago but at that time I think that just as it was in the coal business, there was a selling practice under which they were all headed for bankruptcy due to the cost of labor and so forth but that thing is over today, and it is utterly impossible to invade another market with the cutting of prices. That is true in the coal industry as well as in the by-product coke industry. And the two are closely related.

[fol. 399] I consider the northern markets as a natural outlet for the Chattanooga coke we sell. Our Chattanooga coke is not as good a quality of coke as the Indianapolis,

Terre Haute or Chicago coke in my judgment. The approximate ash content of our coke would be 9.50 and of the others, relatively, from 6 to 6.50, some under that, but around 6 per cent to 6.50 per cent. The rate on our coke has an effect on our sale; for instance in the Chicago market there is a 75 cent switching charge against our freight up there of $4.16. At Detroit you have the same situation, very nominal charge for delivery because of the plants being located there, and the first thing you hear in talking with any dealer in the City of Chicago or Detroit is "what is the object of buying way down there? It takes a long time to get the coke up here, the average minimum would be five days that we can possibly expect, or six days, and we order from Semet-Solvay Company here and have the coke here tomorrow morning" and the same thing in Detroit so that the sales resistance not only from paying out the cash money but the time of delivery during the winter season when delivery is very important all tends to make it a very difficult sales proposition. We sell coke in Detroit or Chicago on what is known as open market, that is the general basis of sales employed in 95 per cent of the cases at least. It was testified here this morning by Mr. Kern for the Central Freight Association carriers that they had reduced short haul rates in some instances to meet competition, truck and barge and so forth, and that did not affect the southern producer at all. We have to meet that same competition. It affects us just as much as it does them, in the same proportion that we deliver. And the same conditions that would justify a reduction in those short haul rates would justify a reduction in our rate.

[fol. 400] Cross-examination.

By Mr. Keeler:

We have never shipped any coke into the Pittsburgh steel area. We have shipped all over Ohio and have shipped domestic coke as high as the Lakes, not quite to Cleveland although we could have shipped some last winter if we had been willing to take what could have been gotten there. We have shipped to Columbus, Dayton, Cincinnati, Canton, Marion, away up to Sandusky and to Detroit a good deal. There is no movement to those points by truck from Chattanooga. I sell the Semet-Solvay Company at Detroit a great deal of coal for coke, and I know what their demand

is. I know that their stock was entirely used up last winter in Detroit and that I shipped them a great deal of coke from Chattanooga. We do not go into the Terre Haute and Indianapolis markets at all. The coal used in the manufacture of coke at Chattanooga is shipped from nearby points.

Coke cannot move from C. F. A. territory into Chattanooga for a number of reasons. I think in the first place you would meet the same resistance coming down there as we meet going North. You have less pressure upon you from surroundings, that is, you have a more absorbing market than we have. You have more foundries, for instance in Illinois in any one section than we have available to us all over the whole state there, larger consumers. That is true of Detroit, Cleveland, Cincinnati, Chicago and true all through Indiana. We are limited. Our invasion of your market on the foundry coke is very small indeed. Domestic coke is a by-product of our foundry coke. We do not want to ship or to make any domestic coke if we can help it. [fol. 401] We get a higher price for foundry coke than for domestic but have to move it because it gets piled up. We have this condition that you do not have. In the South we are right in the center, Chattanooga and Birmingham, of a coal producing area where they have been accustomed to cheap prices on coal, and where they have not been educated, and do not have the necessity of using a fuel like coke so that you can take Memphis or Nashville or those points and there is practically no domestic coke used. It is so little as to be merely nominal and we find that we have got to go into a market where they are accustomed to burn either low volatile coals like the Pocahontas, Anthracite, or coke if we are going to move it at all. A great deal of money has been spent in our territory trying to educate them to the use of coke but it has been an uphill job due to the difference between domestic soft coal and the coke.

Q. Your conclusion would be it would be practically impossible for any of the northern producers to invade that southern territory with their coke, is that correct?

A. I don't think there is any question but what in the first place your cost for your coke, your coke cost is unquestionably higher than ours.

Q. That is the point I wanted to get at, the cost of production can be an important element can't it?

A. Certainly. If we could not produce coke somewhat cheaper than you can because of your higher freight rate, we would be shut right into our own little circle of course.

Q. And the cost of getting coal, the freight rates on the coal into the northern producing points would be, I don't assume that you would know what the precise rates are, but [fol. 402] considering our distance with yours, there is a big difference in the cost of raw materials is there not?

A. Some but your rates on coal from West Virginia and Pennsylvania, New York, the Pocahontas District are relatively lower than our rates, very much.

Q. But "relatively lower", I don't know just what you mean by that term, but in dollars and cents they are very much higher.

A. Not on coal.

Q. Not on coal?

A. No sir, absolutely not. For the immediate coke oven, yes.

Q. What is your coal rate into Chattanooga?

A. You don't understand—I guess I am not making myself clear. Unquestionably our freight rate from our mine to the coke oven, both Chattanooga and Birmingham, our rates are lower than the rates on coal from the Pocahontas and West Virginia field into your ovens, and that would make your cost of the production of coke higher of course, but we have this great long haul of freight, that is almost impossible.

Q. You spoke about foundry coke. As I understand it shipments of foundry coke are the things you are primarily concerned about, that is, that you prefer to ship your coke as foundry coke, and your domestic is sort of what is left over?

A. Exactly.

Q. Is that true?

A. That is not true of all by-product plants, for instance, like, I might say with the two plants at Ashland.

Q. I am speaking about your plant.

A. I am speaking only for Chattanooga, not for Birmingham.

[fol. 403] Q. Chattanooga primarily is interested in foundry coke?

A. We have a relatively high cost and we have to produ a foundry coke, but at the same time we have got the ne of the bottle, as the domestic. We have to move our domest coke.

[fol. 404] Cross-examination.

By Mr. Day:

Q. You will still have the benefit of the present low ra to Chicago from the Chattanooga even if the Commissio permits the suspended tariffs to become effective, will yo not?

A. I could not answer, I am just not a rate man and don't know, I am speaking simply to the present condition If it means that had Chicago and took away Detroit, pe sonally I would greatly prefer, from Chattanooga alone, would prefer to have Detroit than the other but both a absolutely necessary.

Q. You gave an example of switching costs in Chicago a representing the Chicago transportation costs compare with what you pay or are paying?

A. Yes.

Q. I am simply asking if by reason of the action of th Illinois Central and C. & E. I. perhaps in connection with th Southern and L. & N. and other southern railroads if yo would not still have the benefit via those routes of th present low rates?

A. I just cannot qualify as a rate man and I could no answer that question, I just don't know. I am looking t somebody else. I am just trying to sell it and I am no going to answer rate questions because I just don't know, am not familiar with them.

Q. It would not help your company any if the northern lines increased those short haul truck competitive rates t the scale basis would it, and lost the traffic that way?

A. I don't know that I just quite understand that ques tion.

Q. You referred to certain truck competitive rates?

A. No I didn't refer to it somebody else did, Mr. Norma asked that question.

[fol. 405] Mr. Widell: The answer to that question was a general answer to the general question. I think the witness will concede the position counsel states.

A. I merely made the statement to Mr. Norman as I understood him, anything that affected our market up there by reduction of rates, raising or lowering, would be reflected in our own situation.

Q. Your counsel concedes the correctness of the statement in my question.

Q. You referred to what you described as a great deal of coke shipped by you to the Semet-Solvay Company in Detroit. Just how much does that represent in tonnage?

A. Five or six thousand tons. That movement occurred last winter—the winter of 1933-34.

Q. I might say that our records show that the entire movement from Chattanooga to C. F. A. Territory in the year 1933 was only a few hundred tons.

A. This was entirely, practically entirely, in 1934, during February when they had the—the shortage did not develop up there until February so it would be in 1934. We had an order I know for twenty cars a day, I am sure, and then it was switched from those people.

Our normal price of domestic coke is $4.25 to $4.50 F. O. B. ovens. There is some variation. That is in our territory there at home and around there—Southern Territory.

Q. Is the price different where the coke goes out of your territory?

A. We could not possibly move any up, in fact you can see for yourself the return up to Detroit at the present time would only be $2.60 I think it was, wasn't it?

Q. What is your price at Detroit at the present time?

A. We are not shipping any up there at all.

[fol. 406] Q. If you got an order from there what would your charge be?

A. It would only net us $2.60, but if we got an order we would have to get, the lowest irreducible minimum with us today is $3.50. We feel $3.75 is as low as we ought to go under any condition, but sometimes under necessity we have to do something we don't want to do.

Q. $3.50 to $3.75 would represent—

A. The irreducible minimum.

Q. Would represent something like the price you would expect at Detroit?

A. Yes sir, I could not accept the business below it.

Q. Supposing the business was for Washington or Baltimore, what kind of price would you make?

A. I haven't those freight rates. It depends on what t
prices on coke are up there. You are asking a question
to an utterly impossible situation because there is so lit
coke used in Washington and Baltimore as to amount
nothing at all. The other coke plants are so near that
would not be pertinent at all.

Q. If I went to you and asked you about buying some
your coke your question would be to me "Where do y
live" and "Where do — want the coke delivered" befo
you give me a price; is that it?

A. Not of necessity. We would have to say the on
thing — can say, and that is "what is the price where y
are." I don't tell you that we would not accept busine
at $3.75. We have got to accept it if we move coke, if
go into any territory. Our price would not in any case
below $3.50 per ton at the present time, that is F. O.
coke ovens Chattanooga, Tennessee. The maximum pri
[fol. 407] we would hope to get at Chattanooga for domes
coke would be $4.50. The maximum foundry coke price
$6.00 F. O. B. ovens.

Q. Supposing that coke was going to Detroit, what pri
would you make?

A. We have not moved any up there but probably on t
basis, approximately the same. Of course it is all mad
when you ask me that question it is set by the Detro
market. Our irreducible minimum on foundry coke is $5.
and if it is below that we just do not want it, that is a
This would be true if we were shipping it out to Omaha
to the Pacific Coast, it would be $5.00 just the same.

Q. Anywhere else, you would increase this price as y
thought conditions warranted?

A. Our local price and practically to all of the territo
south of the Ohio River is on basis of $6.00.

Q. But you would make the price elsewhere depende
upon the competition that you meet?

A. If we are going to meet competition at all or going
there we do not make the price, they make the price
there. If we are going to sell we have to meet it. B
the yardstick is the minimum we are willing to accept a
I told you the minimum on foundry coke is $5.00 and
the domestic the irreducible minimum is $3.00 on it and
ought to be $3.75.

Q. In what territory do you make the price?

A. We try to make it in Chattanooga, that is about all we can do.

Q. Who makes the prices at points like Charleston, South Carolina, and Jacksonville, Florida, and Atlanta?

[fol. 408] A. I think that is usually based on Birmingham. We take it where we meet with the same freight rate as Ashland or Ironton, we follow their line or base, whatever their base price is and the freight. It depends on where the freight rate crosses.

Q. These points I have named are nearer to Chattanooga than to Birmingham?

A. No, Jacksonville is not. I think it is a little further to Jacksonville, Florida, from Chattanooga than to Birmingham, and I think there is possibly a few cents difference in freight. I am not sure.

Q. In the southern territory where your plant is nearer you would make the price, is that right?

A. If we are the basing point, that is true, yes sir. In other words it is $6.00. If we say $6.00 F. O. B. Chattanooga and Birmingham wants to come in to our direction they simply equalize our delivered price on the lower freight rate, that is all, the same as if we go into Detroit we have to meet the same competition and equalize the delivered price, that is all it amounts to.

Birmingham ships into Chattanooga but we ship very little into Birmingham.

The only coke we produce is domestic, foundry and industrial coke. We make gas coke for gas making purposes and so forth. It is all the same product only it is a matter of screening into the different sizes. We make no furnace coke.

We ship to points west of the Mississippi River. As to Omaha, we have not done much there except a few cars in a year or so. We ship out to the Pacific Coast some. We have done so in recent months or years. We have not shipped to the Twin Cities, Minneapolis and St. Paul. There is a local, you know those ovens up there at Minne-

[fol. 409] apolis control and we have never been able to get in there.

Q. This six thousand ton movement in or about February of 1934 was an unusual movement wasn't it? You don't do anything like that, you hadn't done anything like that in years had you?

A. Well I couldn't answer for I have only been handlin it since April, 1933, is all we have had the sales and I coul not answer that question from direct knowledge. I under stand though there has been a movement from time to time

[fol. 410] Cross-examination.

By Mr. Cronk:

Q. The ideal situation for you, Mr. Bissell, would be a far as marketing coke in the North is concerned, would b one in which the freight rates would be so adjusted tha you would never be required to take less than $3.50 at th ovens on domestic coke or less than $5.00 at the ovens o foundry coke?

A. If you will tell me what the N. R. A. is going to do could answer that question intelligently but I don't know I would like to say that today looking at our cost of pro duction that we believe we cannot accept any business be low $3.50 as a minimum.

Q. We will confine it to today. The ideal situation fo you today would be an adjustment of rates so that yo can sell coke in the North and never have to take less tha $3.50 at the ovens for domestic coke or would never have t take less than $5.00 for foundry coke.

A. I wish that happy situation——

Mr. Widell: I object to that question.

A. —existed.

Mr. Widell: It is highly conjectural.

Mr. Cronk: I am trying to find out to what extent h feels that he ought to be able to get into the market an on what basis.

Mr. Widell: He testified only as to the actual condition as he knows them.

Mr. Cronk: Well he complained about them.

A. We feel that the whole United States is a possibl market if we can get out there and get to it and cover th cost of production at our plant. We feel that is justified [fol. 411] Now if we cannot do that we have just got to b content with what we can do.

Q. The ideal situation would be a market where yo could reach every place and never have to take less tha $3.50 for domestic coke at any of those places?

A. The ideal condition would be where I could get $6.0 a ton for all of it.

Q. All right, $6.00 a ton for all of it. Now what you want is an adjustment of freight rates that will give you your highest price, highest possible yield at the oven isn't it, and a low enough rate into the North to give you the highest possible yield at the ovens?

Mr. Widell: Mr. Examiner, that is not what the witness testified to.

Mr. Cronk: I am talking to the witness.

Examiner McGrath: You may answer, let the witness answer.

A. We think that any freight rate change that would preclude our going into the northern market would be doing us a grave injustice and simply shut the door on us. On the present freight rates it is only possible on domestic coke for us to go in there when the price in the North is at its highest and as a rule, I am speaking only for Chattanooga now, I am not talking about Birmingham, and when the conditions up there more or less invite it, that is to say when it is more difficult, possibly they are not buried up with the local coke, and it is a little more difficult to get it.

Q. You are opposed to an increase in these rates because it reduces your yields at the ovens doesn't it?

A. I am opposed to the rates because it is shutting the door, it is an injustice, it is uncalled for and absolutely discriminatory.

[fol. 412] Q. You don't seem to follow the question at all. Aren't you opposed to an increase in freight rates because it lowers your oven price, isn't that, yes or no, the reason that you are opposed to these increases?

A. It would not lower our oven prices because we are just not going to sell below that. I have told you what the oven prices are. If it does not go to that we are not going to sell it.

Q. You are either in or out of the market depending upon what your oven price is, isn't that true?

A. I think we are just speaking around the question and not getting anywhere. I have told you what our oven price is. Unless the price up there with this freight rate justifies our getting that return at the oven we are not going in there and you are welcome to it.

Q. Does that depend in any measure upon your freigh rate?

A. Absolutely.

Q. That is what I am trying to get at.

A. If we had anything to do with it we would lower th freight rate rather than change it upward as far as we ar concerned.

Q. You are opposed to it because it affects your ability t get into the market?

A. I am opposed to it because it takes us out of th market that we believe we are justified in going into i we can, just as much as anyone else. We believe it is ou market just as much as it is someone else's market.

Q. Does it make any difference to you, do you consider i at all, the question of what the freight rates ought to b from a standpoint of railroad transportation?

[fol. 413] A. Not so far as I am concerned because I an not in that business, I am not on that side of it.

Q. That does not enter into your calculations?

A. I am looking at it purely from the selling standpoin only.

Q. From the marketing situation?

A. That is true.

[fol. 414] Redirect examination.

By Mr. Widell.

Q. As to that coke that you spoke of that went to Detroit to the Semet-Solvay. The Semet-Solvay are producers right in the Detroit area are they not?

A. Very largely so.

Q. Do you know what they did with this coke?

A. They sold it right there in the City of Detroit.

Q. Do you know why they bought it from you that is as to the,—did they put it in their stock pile or sell it?

A. It went right from the cars, was delivered to the various dealers around there.

Q. They did not have enough of their own to supply the trade?

A. Their stock was all wiped out.

Q. In the South, as you know, the South and the North, is there the population or the wealth or the conditions in the South that you have in the North when it comes to purchases of goods like coke?

A. Certainly not.

Q. You mentioned coal as one cheap fuel. It is a fact there are other cheap substitutes in the South?

A. We are having our "T. V. A." and our everything else down there now, the T. V. A. is going to take about all of the coal business there is left, as well as coke, and we have gas, natural gas right into the City of Atlanta, into Montgomery and all through there, taking away,—the Federal Penitentiary has gone to gas from buying sixteen thousand tons of coal. The Veteran's Bureau and the different Government bureaus, I think we are just every day having it taken away from us by natural gas.

[fol. 415] Q. In the consumption of coke in the domestic coke markets for heating purposes and so on, do you have the same character of heating apparatus in the South that you do in the North in the homes?

A. No sir, the absence of furnaces of course in the South is very marked as compared with the North. Our houses are heated, so many of them with grates, and it is only the better or more substantial class of houses and citizens that have what we call the central heating by furnaces. Then of course we have the shorter winter that does not justify it.

Examiner McGrath: Is that all?

Mr. Widell: That is all.

Mr. Keeler: This situation with regard to natural gas is not peculiar to the South; that condition exists in Ohio and that territory, does it not?

Mr. Bissell: Well I don't know. I understand you are complaining in Chicago. I know we are having it awful in the South, it is a very serious proposition.

Mr. Day: As I understand you now, Mr. Bissell, this Coke that you sold to the Semet-Solvay was sold by them in turn to their dealers?

Mr. Bissell: Sold by them in turn to their customers?

By Mr. Day.

Q. Yes.

Q. The Semet-Solvay people told me that they did not make ten cents a ton I think it was on the coke, that they sold it to them at that price because they were unwilling to increase the price to take advantage of the winter conditions and they delivered it right to the dealers right directly on practically the basis it cost them.

[fol. 416] Q. That is whether the dealers were in Detroi or shipped out to Battle Creek or wherever it may hav gone?

A. It went all to Detroit practically.

Q. You are sure it was consumed in Detroit?

A. So far as the Semet-Solvay Company was concerned But the Continental Collieries they moved some. They have offices in Cincinnati as well as Detroit, and they moved some outside.

Q. From Detroit to points outside?

A. I think that we billed it direct to the points outside; it may have been re-billed.

Q. But the Semet-Solvay people told you that in the rehandling they gave this coke that you shipped to them at Detroit they did not make over ten cents a ton profit?

A. I don't want to put that in the record as an absolute statement, but practical enough for ordinary purposes.

[fol. 417] F. A. Burke, a witness for the Southern Railroads, protestants, testified as follows:

Direct examination.

By Mr. Reynolds.

I am Commerce Agent of the Nashville, Chattanooga and St. Louis Railway with headquarters in Nashville, Tennessee.

Our particular interest in this matter is in connection with the rates from Chattanooga to destinations in Illinois and Central Freight Association territory. I am appearing in opposition to the suspended schedules. It is my position that the rates from Chattanooga to destinations in Illinois and Central Freight Association territory should not exceed the rates made on basis of the so-called Central Freight Association scale 2 as shown in Appendix 8 of the decision in I. & S. Docket 3511. Now in advocating the Central Freight Association scale from Chattanooga to the northern destinations, we are advocating it not only where it will produce increases but also where it will produce reductions in the existing rates from Chattanooga to the destinations in question. It is therefore correct to say that we are opposed to the suspended rates and in lieu thereof propose for application from Chattanooga to Central Ter-

ritory the same level of rates as apply within Central Territory.

[fol. 418] Exhibit 9 compares the present rates from Chattanooga to Central Freight and Illinois Freight Association territory with the suspended rates and with the rates on the basis that I have previously suggested, or the C. F. A. Scale for the distance involved. Now these rates are shown on my Exhibit No. 9 under the column "Proposed Rates". Now there has been so much controversy about the destinations shown in Witness Behring's exhibits that I would like to say that the destinations shown in my Exhibit 9 are the destinations contained in Supplement No. 8 to Agent F. L. Speiden's I. C. C. Tariff 1770 which is the suspended tariff. There was a change published effective May 1, 1934. Exhibit No. 9 shows those stations to which there was a change made in the existing rates effective May 1, 1934.

Now I might further supplement that by saying that when publication was made of the revised rates from Chattanooga to destinations in Central Territory in conformity with the requirements because of the revision in the concurrences granted us by Central Freight Association Lines that we found ourselves unable to check out rates to every destination in Central Freight Association and Illinois Territory that had previously been carried in the Chattanooga [fol. 419] Coke Tariff so we were rushed for time and the Chattanooga carriers called upon the manufacturers at Chattanooga to supply them with a list of the points to which there was a probability of a movement from Chattanooga and in this Supplement No. 8 we undertook to publish revised rates on basis of the interterritorial scale in I & S Docket 3511, but through error the rate clerk who compiled the tariff, or compiled the manuscript for the tariff, cancelled the rates to other points and showed the cancellation was made because there was no movement. There was a number of these points in Central Freight Association and Illinois Freight Territories that are actually involved in this proceeding because of that cancellation. I might further add that from Chattanooga, Tennessee, quite a lot of coke moved to points intermediate to other points to which there are specific rates and that such movement takes place under an intermediate note, authorizing the application of the further distant point rate, so it is almost an impossible task to set out here in

any form that might reasonably be considered all of the suspended rates from Chattanooga to destinations in Central Freight and Illinois Freight Association Territories. It might be generally stated that from Chattanooga that generally speaking the rates to destinations in Illinois Freight and Central Freight Association Territory are under suspension.

Mr. Day: Is that true of points on the Illinois Central and Chicago & Eastern Illinois for instance?

Mr. Burke: To points on those lines via those lines it would not be true. I said generally speaking and to points on those lines via routes through Central Territory it would be true. I am speaking of common junction points. [fol. 420] Mr. Day: They have either their own lines direct or make through routes in connection with the southern lines?

Mr. Burke: In connection with our line, yes, we have a direct connection with the Illinois Central but if the movement was through Central Territory to those common points the route was changed and the changed conditions because of that is under suspension.

Q. If I understand you correctly, Mr. Burke, Exhibit No. 9 contains a list of all the destinations to which there was a movement but to which the rates were suspended?

A. No, it contains of the points to which specific rates were published May 1, 1934 that resulted in changes in existing rates from Chattanooga.

Mr. Day: There, do you mean via certain routes?

Mr. Burke: No, via all routes.

Mr. Day: I am just asking this question for information. Mr. Burke, take Danville, Illinois, for instance, as I understand it Danville being a point on the main line of the Chicago & Eastern Illinois and the Eastern Illinois going along with the southern railroads in their proposal to keep the present low rates wherever they can, the rates to Danville in connection with the C. & E. I. were not changed were they?

Mr. Burke: Just a minute please sir.

Examiner McGrath: That exhibit shows the present Danville rate is $4.60 and the scale rate $4.00.

Mr. Norman: The suspended rate is $4.00, isn't it?

Examiner McGrath: Yes.

Mr. Burke: The rate to Danville, Illinois, the present rate in Agent Speiden's I. C. C. 1770 to Danville is $4.16, the suspended rate in Supplement No. 8 to Danville, Illinois is $4.00.

[fol. 421] Mr. Day: In connection with the C. & E. I. there is no provision made for any change, there was no change made in connection with the C. & E. I. or Illinois to any of their points was there?

Mr. Burke: I could not say positively if that is so.

Mr. Day: All right.

Mr. Burke: I can say this, Mr. Day, that the C. & E. I., the I. C. Railroad nor the C. & E. I. did not withdraw their concurrence to their territory.

Mr. Day: That is all right.

Mr. Norman: It looks in that case though as though there were a reduction and therefore a change was made, a reduction to observe this interterritorial maximum, wasn't there?

Mr. Widell: Just at that point, to clear up anything about the failure to suspend the Danville rate or to increase the rate to Danville, it should be understood, Mr. Day, that if we want at Danville a delivery by the C. F. A. Lines team track delivery, our rate would have been that figure there.

Mr. Burke: In order to give the Commission, however, a picture of the situation that has actually happened in the past I offer as my Exhibit No. 10, a statement showing the present rates to all points in Illinois Freight and Central Freight Association Territory to which there was an actual movement during the period January 1, 1933, to March 31, 1934, and I have contrasted those present rates with the interterritorial scale under I. & S. Docket 3511 and with the C. F. A. Scale Column 2 of Appendix I. & S. Docket 3511. I think that between these two exhibits Nos. 9 and 10, we have given the Commission a fairly representative picture of the situation resulting from the I. & S. Docket in this case in so far as Chattanooga, Tennessee, is concerned.

[fol. 422] Mr. Day: Just to make this point I am trying to get across perfectly plain, take the case to Chicago. You show the present rate is $4.16, won't that rate continue in effect via the Illinois Central and the C. & E. I. and some other railroads that did not non-concur?

Mr. Burke: It continues today at $4.16. If the Commission approves the application of the C. F. A. scale from Chattanooga to Illinois Freight Association Territory and

the Illinois Central will join us in the reduction we will publish a rate of $4.15 from Chattanooga to Chicago and we anticipate that if the Commission does approve this scale we will have no difficulty in getting the Illinois Central to join us in that adjustment.

Mr. Day: Here is the point I want to make, Mr. Burke, that you have a rate of $4.16 in effect today in connection with the Illinois Central Railroad, the C. & E. I. and other railroads. Now whether the $4.55 rate is approved in connection with the New York Central, Pennsylvania, B. & O. and other roads under the rates proposed in the suspended tariffs or not, you will still have this $4.16 rate in connection with the I. C. and the C. & E. I.?

Mr. Burke: So long as those lines continue their concurrences, yes, sir.

Mr. Day: They have not changed them?

Mr. Burke: No, sir; not to this time, so far as I know.

Mr. Day: And the same is true of those intermediate points like Joliet and Momensen, there would not be any change in those rates?

Mr. Burke: Via the Illinois Central, no, sir.

Mr. Day: Nor the C. & E. I.?

Mr. Burke: Nor the C. & E. I., that is correct.

Mr. Day: And other Illinois roads?

[fol. 423] Mr. Burke: And other roads that have not cancelled their concurrences.

Mr. Day: It is only the C. F. A. roads proper that have ever cancelled their concurrences as I understand, the western roads and the Illinois roads have not concurred, have they?

Mr. Burke: Not up to the present time so far as I am informed.

Examiner McGrath: What are some of those carriers besides the Illinois Central?

Mr. Day: The Burlington and Northwestern?

Mr. Burke: The Burlington and C. & N. W.

Mr. Day: And the Rock Island?

Mr. Burke: And the Rock Island Lines.

Mr. Norman: C. & E. I. and Illinois Central.

Mr. Day: The T. P. & W.

Mr. Ribe: St. Paul.

Mr. Burke: The Monon.

Examiner McGrath: They have not undertaken to with-

draw their present concurrences nor to restrict the participation in the rates as the C. F. A. Lines have done?

Mr. Burke: Not up to the present time, no, sir. Before leaving Exhibit No. 10 I would like to ask that the interterritorial rate there, that the rate shown on the interterritorial scale to Decatur, Illinois, be changed from $5.15 to $4.15.

Examiner McGrath: Am I correct in understanding that the rates shown under that heading, interterritorial scale, are the suspended rates.

Mr. Burke: They are the suspended rates in so far as the rates to any of these points are suspended.

Examiner McGrath: The exhibit does not indicate that.

[fol. 424] Mr. Burke: What I was trying to do was to give the Commission an actual picture of the conditions that would result if the C. F. A. Lines' scale was approved for application in this case and I thought the best picture was to take points in Illinois Freight and Central Freight Association Territories to which there was an actual movement.

Q. The application of the C. F. A. scale, as clearly shown by the exhibit, will result in both increases and reductions in the present rates, is that correct?

A. That is correct. While the application of the interterritorial scale will result largely in increases.

Exhibit 11 compares the present, the suspended and the proposed rates from Chattanooga to representative destinations in Central Freight Association and Illinois Freight Association territories with the rates from coke producing points in northern territory to the same destinations. There is indicated those points under suspended rates from Chattanooga which I have used the interterritorial mileage scale, for the distance involved. This would be cases to which the present rates have not been changed at this time, for example, Chicago, Illinois, there I show that the suspended rate is $4.55 but I have shown the character opposite that to show that the $4.55 represents the interterritorial mileage scale for the distance. Now I will ask you to turn to Sheet No. 2 [fol. 425] under the heading "Detroit." Detroit is one of the most important points of destination for Chattanooga, Tennessee. There we have the present rate from Chattanooga to Detroit of $3.65 per ton. Under the suspended basis

the rate would be $4.55 per ton. Under the basis we hav proposed here the rate would be $4.15 per ton. Even unde our proposed basis the rate from Chattanooga to Detro will be increased fifty cents per ton.

Q. And is it, or is it not, a fact that a rate of $4.15 fro Chattanooga to Detroit will be from forty cents per ton $2.75 per ton higher than a rate, than the rate from an coke producing point in Central Territory?

A. From the coke producing points I have shown, and picture those or rather I used those points because thos are the points that were furnished me by the Chattanoog manufacturers as competing points in northern territor

Examiner McGrath: How do you compute your distance there?

Mr. Burke: I compute our distances via the short lin

Examiner McGrath: The shortest distances over route by which this can be moved without transfer of lading?

Mr. Burke: That is as far as I could I used the Cla Rate Distances both in Southern and Central Freight Ass ciation Territories by the various Ohio River Crossing My Exhibit No. 12 illustrates more clearly what I was tr ing to show by my Exhibit No. 11. This is a chart c which I have undertaken to spot as nearly as possib the geographical location of the different points shown o Exhibit No. 11, using Detroit as the point of destinatio There is one exception to this, that is Granite City, Illinoi where I could not spot the exact location on the chart.

[fol. 426] Q. In other words Exhibit No. 12 as I unde stand is drawn to scale, is that correct?

A. It is spotted to a map, geographically correct ma the origins and destination, Detroit. Now you can see at glance the disadvantage that Chattanooga has, and I migh add that geographically a disadvantage because of the di tance. The distance from Chattanooga to Cincinnati, Ohi is 338 miles, to Louisville 312 miles, from Chattanooga Evansville, the nearest North bank Ohio River, crossin 308 miles and to Cairo, Illinois, 354 miles. So under all ci cumstances and conditions Chattanooga has a disadvantag of over 300 miles to start out with before it reaches Centr Freight Association territory. Now with a higher sca rates from Chattanooga to destinations in that territory is a further handicap against Chattanooga in the dispos

tion of coke in northern territory. We first have the geographical disadvantage because of the greater distance from Chattanooga, and with a higher scale of rates from Chattanooga than is in effect in central territory. Chattanooga must meet this further handicap and we are told by our manufacturer at Chattanooga—and we accept that as being true—that they cannot reach northern territory unless we publish and the Commission approves this so-called C. F. A. scale.

[fol. 427] Examiner McGrath: You gave various distances indicating the disadvantage of Chattanooga. Over what lines did you use those distances?

A. Those are the short line route- from Chattanooga, the distance from Chattanooga to Cincinnati is figured via the C. N. O. & T. P. from Chattanooga to Louisville, that represents the C. N. O. & T. P. Railway, to Junction City, and L. & N. to Louisville, the distance from Chattanooga to Evansville represents the distance of the N. C. & St. L. from Chattanooga to Nashville and the L. & N. beyond Nashville. The distance from Chattanooga to Cairo represents the Nashville, Chattanooga and St. Louis Railway distance to Nashville, the L. & N. Railroad distance to Hopkinsville, Kentucky and the Illinois Central distance from Hopkinsville, Kentucky via Paducah, Kentucky to Cairo.

My Exhibit No. 13 is similar to No. 12 using Toledo, Ohio as the destination rather than Detroit. What I have said in regard to Exhibit No. 12 applies with equal force to Exhibit No. 13.

Exhibit No. 14 is similar and shows Chicago, Illinois as the destination in Northern Territory. Here again the situation is quite similar to that on Exhibits 12 and 13.

It is our view in connection with this matter that the rates on coke from Chattanooga, Tennessee to southern destinations should be given consideration in fixing rates not only in the South but to Northern Territory.

Exhibit 15 shows the present rates from Chattanooga to destinations in southern territory to which there was an actual movement during the year 1933. I have contrasted these present rates with the rates based on Scale 2 or the C. F. A. Scale and Scale 3 or the Interterritorial [fol. 428] Scale in docket 3511. I have also shown the total

revenue on basis of the three scales. On page two of exhibit is a summary. On the basis of the present r from Chattanooga, to southern destinations the aver rate, and that is the weighted average, is $1.91 per If the C. F. A. scale was in effect from Chattanooga to t southern destinations the average rate would be $2.24 ton or thirty-three cents a ton higher than the pre weighted average rate. If the interterritorial scale been in effect, the average rate to these destinations w have been $2.42 per ton, or fifty-one cents a ton higher on basis of the existing rates. So you see, Mr. Exami from this exhibit that from Chattanooga to actual po of consumption in southern territory the present rates lower than the C. F. A. scale.

[fol. 429] My Exhibit 16 reproduces the rates show Exhibit 15 in a chart form. On this chart I have indic the rates from Chattanooga by a vertical line and inserted the C. F. A. scale as a constant line and the in territorial scale as a broken line. You will see by refer to this chart that to those points to which there was a stantial movement that the rates from Chattanooga well below both the C. F. A. scale and the interterrito scale. For example, Nashville, Tennessee, 152 miles t we have a movement of 29,455 tons. Note that the ra well, the rate to Nashville is well below the C. F. A. s or the interterritorial scale. Cincinnati, Ohio, is ano illustration, under 338 miles. Before leaving Exhibit 16 I ask that you correct the spelling of Valdese, N Carolina, 307 miles. On the chart it is shown as Baldes

Q. Now, Mr. Burke, Nashville and Cincinnati, the po to which you have just referred, received more coke t any other points in the Southern Territory, is that corr

A. No, the information, however, is contained on Exh No. 15. You will see to Rockdale, Tennessee there w movement of 19,661 tons. Rockdale is 175 miles from C tanooga.

Q. And the rate to Rockdale is considerably less than C. F. A. scale or the interterritorial scale?

A. That is correct, yes, sir. Dealing further with r from Chattanooga to southeastern points I now offer Exhibit No. 17 which shows the rates that were in e from Chattanooga to representative southeastern d nations on July 1, 1915. I would like to say at this t

that the by-product coke plants at Chattanooga began operations along about July 1, 1915 and that this was the first time that any rate had been provided from Chattanooga on by-product coke. Prior to that time there were a few scattered rates on gashouse coke.

[fol. 430] Now yesterday the Witness Kern referred to the fact that the rates from Chattanooga to the North were out of line for the past twenty years. He made the statement that the rates from Chattanooga were out of line for the past twenty years. Now there were not any rates on by-product coke prior to 1915, from Chattanooga to even Southeastern points. The rates to northern destinations were published after that time. I understand another witness will submit the statement showing the rates from Chattanooga in chronological order to northern destinations. But the first rate to northern territory I believe was published in January, 1916. Now this Exhibit No. 17 compares the rates on coke from Chattanooga, and that is by-product coke, with the rates on coke and coal from Whiteside, Tennessee. Whiteside, Tennessee is a mine or was at that time on the Nashville, Chattanooga and St. Louis Railway about thirteen or fourteen miles west of Chattanooga. In those days our rates on coke and coal were substantially the same from coal mining sections. So when we were called upon to establish rates on by-product coke, rates were established from Chattanooga in line with the rates on bee hive coke from such points as Whiteside, Tennessee on the N. C. & St. L. Railway Company, Rathburn and Graysville on the C. N. O. & T. P., just North of Chattanooga, and Chicamauga and Durham, Georgia, just South of Chattanooga on the Central of Georgia Railway. The rates from Chatta-
[fol. 431] nooga that we publish now were effective July 1, 1915, and were related to the Bee Hive coke rates from these mining towns and they in turn were related to the rates on coal. Therefore the rates on coke bore all the competitive situations that govern in connection with the coal rates. And although probably coke did not meet the same competition as coal yet the rates on coke were substantially the same as on coal.

Q. It is a well-known fact isn't it, Mr. Burke, that your coal rates are highly competitive?

A. That is a fact, yes. In this statement I have compared the rates from Whiteside with the rates that were

established July 1, 1915, from Chattanooga to the Southeastern points. You will notice that in quite a number of cases that the rates published from Chattanooga were the same as the rates on coke from Whiteside and those rates in turn were the same as the coal rates from Whiteside. Now in addition to the points I named the rates on coke from Birmingham to Southern destinations were also taken into consideration in fixing the rates from Chattanooga.

Exhibit 18 shows the changes in rates on coke from Chattanooga to the southeastern destinations shown in Exhibit 17. The purpose of this exhibit is to show that the rates on coke established in 1915, with some few exceptions, remain in effect to the present time except for general increases and reductions. This exhibit shows that rates from Chattanooga —

[fol. 432] Now in C. F. A. territory we know that the C. F. A. scale applies and the suspended rates are on the interterritorial scale which is higher than the rates in Southern territory and the rates in Northern territory. We have that abnormal condition then that if we are required to publish this interterritorial scale and maintain the rates of having rates made in our territory, or rather from one territory into the other on a higher level than exists on either of the two territories.

It might be said by some that the Appendix, the Scale 2, Appendix 8 is too low from Chattanooga to Northern destinations or is on too low a level. In order to rebut such a condition I now offer my Exhibit No. 19 which compares the rates on coke from Chattanooga to representative northern destinations with rates on natural asphaltic limestones, both raw material and processed material. These rates were prescribed by the Commission for application from points in southern territory to destinations in Official territory. I wish to direct attention to the values of these commodities as shown on page two and contrast those values with the values of coke as given by Mr. Bissell representing the Chattanooga plant in his testimony yesterday.

Exhibit 20 is similar in character and contrasts the per car revenue on coke from Chattanooga on basis of the C. F. A. Scale with the car revenue that would result from the basis of rates approved by the Commission on charcoal from southern origins to the northern destinations. Char-

[fol. 433] coal is manufactured at points on the N. C. & St. L. Railway and shipped into Northern territory. It is a fact that charcoal is not manufactured at Chattanooga but it is manufactured at other points on the N. C. & St. L. Railway. In the heading of the second column of Exhibit No. 19 there should be inserted reference to Exhibit No. 9 for routes; also in Exhibit No. 20.

Exhibit 21 shows the movement of coke via the N. C. & St. L. Ry. for the period 1929 to June 30, 1934, inclusive. This shows that the average of coke originating on the N. C. & St. L. Ry. is 31.162 tons, which average loading is used in the preparation of the previous exhibit. The average loading on the N. C. & St. L. Railway on coke has increased in the last two or three years. I understand that practically all of this coke to Central territory moved in open top equipment.

The rates from Chattanooga to destinations in C. F. A. territory were not in issue under Section 1 in I. & S. Docket 3511 or in any of the related cases in that proceeding. The only allegation against Chattanooga was the allegation of undue prejudice and if you refer to pages 6, 7 and 8 of the Commission's decision you will find that there is no definite finding under Section 3 of the Act. In consequence there was no order issued against Chattanooga. This revision [fol. 434] from Chattanooga in this proceeding was brought about entirely by the action of the Central Freight Association Lines in changing the concurrences that they had granted the Chattanooga carriers. In regard to the revision that was made on March 15, 1934 from Chattanooga the only change made was to reduce the rate from Chattanooga in those cases where they were higher than the revised rates from Birmingham, Alabama. The Birmingham rates effective March 15, 1934, were of course issued in compliance with the Commission's decision in I & S Docket 3511. That is all I have.

Mr. Reynolds: Mr. Examiner, I would like to offer in evidence the Exhibits Nos. 9 to 21 both inclusive.

Examiner McGrath: The exhibits are received.

(Whereupon said exhibits of Witness Burke, numbered from 9 to 21, inclusive, were received in evidence.)

Mr. Reynolds: That is all on direct examination.

Examiner McGrath: Are there any questions, Mr. Norman?

By Mr. Norman:

Q. Mr. Burke, in view of the failure of the proponents of these tariffs which disclosed much of the real situation here can you give us a complete list of the lines in this Illinois Territory that did not file concurrence cancellations and therefore whose rates or rather rates to points on whose lines are not affected in this territory?

A. I can—I would not attempt to do that offhand, however. If you think it is necessary and will give me sufficient time I will compile such information and submit it.

Q. It may of course be put into the record later. Can you name some of the important ones now?

[fol. 435] A. I think most of them went into the record yesterday, such roads as the Burlington, the Rock Island, the Illinois Central, the C. & E. I., the Chicago, Peoria and St. Louis.

Q. Is the St. Paul one of them?

A. I think that is correct, yes sir, and the Northwestern, the Chicago and Northwestern.

Examiner McGrath: In that connection are we to understand that there are no schedules under suspension here by which rates are proposed to be increased to destinations in Illinois on those lines?

Mr. Burke: I have not checked that out to that degree, Mr. Examiner, to make a positive statement to that effect, but those lines so far as I know, and I sort of keep up with this proceeding, did not cancel their concurrences.

Examiner McGrath: That is clear to me. But now I am asking you whether notwithstanding that fact the carriers have filed schedules proposing to increase the rates from Chattanooga to destinations on those lines in Illinois to the basis of the interterritorial scale?

Mr. Burke: I could not give you a positive statement without checking the tariffs, Mr. Examiner. I would not want to attempt to do it.

Q. Well you know they have not to Chicago, for example?

A. To Chicago we maintain the existing rates, we have the routes in connection with the Illinois Central, the C. & E. I., to Chicago at the present time. We have other routes in connection with the Burlington to Chicago, the Burlington is a direct connection of the N. C. & St. L. Railway Company.

Q. Of course the check of the carriers participating in the tariff under suspension would by the process of exclusion show what ones were not in effect?

A. That is correct, yes sir.

[fol. 436] Cross-examination.

By Mr. Keeler:

The points on the Burlington Railway, C. & N. W., and so forth, that I referred to, are not Western Trunk Line points; they are points in Illinois, Illinois Freight Association Territory.

The Burlington through the P. & I. Railroad connects with the N. C & St. L. at Metropolis or Paducah. Paducah is our river crossing and the Burlington's North Bank Crossing is Metropolis, Ill., and the P. & I. is the connecting link between the two carriers and is owned by those two carriers and the Illinois Central Railroad.

The points I referred to are points intermediate to Chicago, principally.

The Illinois Central has a direct line out of Birmingham to Chicago; and our line and the Illinois Central forms a through route to Chicago.

Had the other carriers withdrawn their concurrences to the rates, the rates via those two routes from Birmingham and Chattanooga would have been on a higher basis than the rates via the Illinois Central and via our line and the Illinois Central. I do not attach any great significance to the fact that the Burlington and the C. & N. W. and these other lines failed to withdraw their concurrences. There were however certain lines that did withdraw their concurrences who thereby went out of this business—quite a number of them.

Cross-examination.

By Mr. Widell:

The matter of revising rates on coke in the South has been under consideration for some time but as to what will be finally done I do not know but I doubt very seriously if the carriers will be able to make any substantial increase in the existing level in Southern Territory.

[fol. 437] I am familiar with the origin of coke rates in Southern Territory. The coke rates originally, I am speaking for my own line now, were made as I explained in connection with my exhibit, the same as the rates on coal.

In Southeastern Territory the first change from the original basis was brought about by General Order No. 28 of the Director General. Going from southeastern points into the valley I believe there was a change made in a fourth section revision some years ago when coke, my recollection is, was made 25 cents a ton higher than the rates on coal, but in the Southeastern Territory the differences between coal and coke rates were brought about by the differences in the increases authorized by the Director General under General Order 28 in 1918. Then that was modified later by the ex parte increases and the reduction of 10 per cent in 1922.

Cross-examination.

By Mr. Cronk:

My Exhibit No. 9 shows the rates to points that are under suspension. All of those rates are under suspension in this proceeding, that is from Chattanooga. That being so, there are both increased rates and reduced rates under suspension from Chattanooga.

[fol. 438] Cross-examination.

By Mr. Donadio:

The coke rate structure in the South, about which I testified at some length in my direct testimony, was given consideration by the Commission in its decision in Docket 3511, and with respect to that they said at page 677 of the report:

"The fact that the present untreated coke rate structure in the South is lower than in Central Territory has no special significance in the determination of the maximum reasonable interterritorial rate."

There has been no general change in the measure of the rates on coke in the South since that decision. The rates from Chattanooga to points in C. F. A. territory in I. & S. 3511 were not in issue under Section 1 of the Act. The

only manner in which the rates from Chattanooga to central territory were in issue in these cases was under Section 3, and the Commission said at page 68:

"It is believed that the establishment of the rates hereinafter prescribed as maximum reasonable will remove any undue prejudice that may exist in the assailed rates."

[fol. 439] Q. Now I understood you to say that your Exhibit No. 19 was designed to show that the scale, that the Appendix 2 scale was sufficiently high for interterritorial application on coke from the South.

A. Yes, sir.

Q. You made a rather vigorous search did you not, Mr. Burke, to sustain that proposition? It is a very important matter here isn't it?

A. I wouldn't say such a vigorous search. I could have found other commodities. I believe the per car revenue we get out of coke from Chattanooga to Central Territory at the present time under the,—would get from Chattanooga to Central Territory under the C. F. A. scale would closely approximate the car revenue we get on stoves, a manufactured commodity, and shipped from Chattanooga to destinations in Central Territory; and, incidentally, those were prescribed or approved by the Commission.

Q. Now was there any competitive proposition involved in this asphaltic limestone case, such as is involved here?

Mr. Norman: Yes.

Q. Was there production in the North as well as production in the South?

A. All I know about that case is what is contained in the Commission's report.

Q. The Commission has treated a great many commodities which are produced both in the North and in the South though, have they not?

A. Yes sir.

Q. And prescribed reasonable maximum rates, free from undue prejudice and preference, have they not?

A. Yes, they have done that frequently.

[fol. 440] Q. But you haven't presented any here.

A. I presented the few comparisons that are shown in my exhibits 19 and 20.

Q. Those are the only two that you thought were pertinent to the issues in this case?

A. Those two served my purpose. I could have fou
some others.

Q. What is the Official Territory level with respect
these commodities that you have shown here, how does
compare with the interterritorial basis?

A. I don't know. Charcoal was at the time our rates
charcoal were prescribed, they had numbers of rates
charcoal in Central Territory that were lower than t
Commission approved for application from the South
the North. But I might say that the manufacturers
charcoal on our line are certainly not satisfied with the
rates, as compared with rates in the C. F. A. Territor
and there will probably be other proceedings in that matte

Q. You feel that these two commodities which you ha
shown are sufficient to sustain the proposition that yo
advanced, that the Appendix 2 scale is sufficiently high fo
interterritorial application, and also provides a non-preju
dicial basis of rates, do you?

A. Yes sir.

[fol. 441] Cross-examination.

By Mr. Day:

The only by-product coke plant we have on our line i
Chattanooga, Tenn., at present. The figures shown on m
Exhibit No. 21 do not represent the Chattanooga tonnage
we have got some beehive coke at some of the coal mine
but I would say that those figures shown, the preponder
ance of them would be Chattanooga tonnage. As to whethe
they would be 90 per cent, I wouldn't estimate, I couldn'
estimate the percentage.

Q. State if it is not a fact that to all of the Illinois point
shown on your Exhibit No. 10 there will be no change in th
rates from Chattanooga, so far as the Illinois Central, C. &
E. I., and Western Trunk Line railroads are concerned, so
that Chattanooga will still have available the present low
rates to every one of those Illinois points?

A. Well, we are not required under any concurrence
change to change any of those rates. But as I stated yes
terday, our contention favors the adoption of the so-called
C. F. A. scale to Illinois Freight Association, and Central
Freight Association territory, if the Commission will ap-
prove it in this proceeding.

Q. By that, you mean you think there should be a uniform level of rates throughout Central Freight and Illinois Freight Association territory from the South?

A. Yes, sir.

Q. Under Indiana, you show as one of the three points of destination, Grasselli. That is a point in the Chicago switching district, is it not, to which Illinois Central, C. &
[fol. 442] E. I., the Burlington and other rates would apply?

A. I couldn't tell you, Mr. Day.

Q. Under your authority for routes at the bottom of the exhibit you show a routing via Danville, and the Grand Trunk Railway. Apparently there is some omission there, because the Grand Trunk doesn't reach Danville.

A. What is that point, Mr. Day?

Q. The last route shown at the bottom of the page, G, marked "G".

A. I would like to check that and advise you later as to that point.

Q. There must be some line omitted.

A. Yes sir, I agree with you as to that.

Examiner McGrath: Will you do that during the course of the hearing, Mr. Burke; will you make that check during the course of the hearing?

Mr. Burke: I will, yes.

Q. On your exhibit No. 11, you show rates from certain C. F. A. producing points, as well as Chattanooga, to destinations in Illinois, or C. F. A. Territory.

A. Yes sir.

Q. I note that nowhere on the exhibit do you show Connellsville, Pennsylvania as an origin. Is there any reason for omitting Connellsville?

A. No, I explained when I filed that exhibit that those Northern origins that are shown were furnished me by the manufacturers at Chattanooga, as the points with which they had to compete in Central Territory, and I made no selection myself. The selection was made by the Tennessee Products Corporation as to those points.

[fol. 443] Q. Connellsville does ship a relatively large volume of coke into C. F. A. Territory, does it not?

A. I don't know, but I assume that it does.

Q. I think the witness from the Chattanooga coke plant, or one of them, yesterday testified that he was meeting

competition of beehive coke at Detroit, and perhaps so
other points. Did you hear that testimony?

A. I couldn't hear all that he said; he didn't speak lo
enough for me to hear all that he said.

Q. In the movement of coke from Chattanooga to poi
in C. F. A. Territory, is it not true that three lines of ra
road would be required to make up the route, ordinaril

A. To Central Freight Association Territory?

A. Yes, to C. F. A. Territory.

A. In connection with the line which I represent, y
In connection with the Southern Railway, I would say
because the Southern Railway has a direct line from Ch
tanooga to Cincinnati. That is, we have to connect wi
the L. & N. to go through Louisville, or Cincinnati,
Evansville.

Q. As a matter of fact, one of the points in Illinois sho
in your Exhibit No. 10 is a Southern Railway point, is
it, Mt. Carmel?

A. It probably is, yes.

Q. Now in the movement of coke from the C. F. A. Ter
tory origins referred to in your Exhibit No. 11, it is tr
that only one line of railroad would be required in t
transportation, isn't it?

A. I don't know sir.

Q. Do you know any reason why the rates of the Illin
Central, Burlington and C. & E. I., in connection with t
Southern lines from Chattanooga should be on any low
basis than rates in connection with the so-called C. F.
[fol. 444] lines from Chattanooga?

A. Not if the proper rate level prevailed.

Q. That is, the routes in connection with the C. F.
Lines, generally speaking, are no more circuitous th
they are in connection with the Illinois Central or the C
cago & Eastern Illinois?

A. Oh, I would not say that they were unduly circuito
for that matter.

Q. So far as you know, the transportation conditio
would not be any more difficult or expensive in connecti
with the Central Freight Association Lines?

A. I wouldn't say so, no sir.

Mr. Norman: It is a difference in heart, rather than
difference in physique, isn't it?

Mr. Burke: Maybe so.

Q. Did you hear the testimony of Mr. Behring yesterday, for the Southern Railway?

Mr. Reynolds: Don't cross-examine this witness on Mr. Behring's testimony.

Mr. Day: I am asking him if he heard his testimony.

A. I couldn't hear it all. I wouldn't say that I did, for he talked very low, and I was in the back of the room.

Q. What have you to say as to the relative transportation conditions in respect to their arduousness of operation, comparative costs, and so forth, between the Southern Territory on the one hand, and C. F. A. Territory on the other hand? Do you regard the conditions in the South as more difficult and expensive than in C. F. A. Territory?

A. Yes, I do. But I think that in fixing inter-territorial rates, that is only one factor to take into consideration, Mr. Day.

[fol. 445] Q. You want rates made on competition.

A. Absolutely, yes sir, to meet competitive situations, and not have rates so high that the traffic won't move from Southern Territory.

Q. And you want the Commission to disregard relative transportation conditions, and fix rates only with regard to the competition in mind.

A. I think that they ought to give a great deal of weight to the competitive situation.

Mr. Day: I think that is all.

Mr. Reynolds: You don't want them to disregard absolutely transportation conditions?

Mr. Day: Just a moment. I object to the question as leading.

Mr. Reynolds: Well, state whether or not you wish the Commission to disregard entirely transportation conditions in fixing inter-territorial rates from the South to C. F. A. Territory?

A. No, I wouldn't say that. It would be one factor to consider and the competitive factor would be another factor to be considered.

Mr. Reynolds: You are satisfied to have them consider the transportation conditions, are you?

Mr. Burke: I think they should, yes.

Mr. Reynolds: That is all.

Mr. Widell: Mr. Burke, is the transportation burden distributed among commodities in the South the same as they are in the North?

A. Not entirely, no sir.

Mr. Widell: Do you know that there are differences in [fol. 446] that respect, so that on many commodities in the South the rates are as low or lower than in the North?

Mr. Burke: I know on some commodities that situation does exist, yes.

Mr. Widell: And that is true on coke, isn't it?

Mr. Burke: It seems to be, from my statement. It is true on lime, and it is true on brick.

Mr. Widell: Are you familiar with the recent brick case from Southern Ohio points to Atlanta?

Mr. Burke: I haven't read it, I don't recall reading it, no sir.

Mr. Widell: Thank you, sir, that is all.

Examiner McGrath: Are there any other questions of this witness?

By Mr. Day:

Q. Fertilizer is one of the most important commodities handled by Southern railroads, isn't it?

A. It is an important commodity, yes sir, one of them, at least I would say.

Q. Isn't it true that the level of all—the level within the South, and inter-territorially from the South to C. F. A. Territory is higher than within C. F. A. Territory proper, Mr. Burke?

A. Between points in the South the rates are higher than in Central Territory. Southbound from Central Territory to the Southern Territory, the Commission has in a number of cases prescribed rates that were based upon the application of the Central Territory scale for the entire distance, plus arbitraries for the haul south of the River.

[fol. 447] Q. And that is to take care of the more difficult transportation conditions in the South?

A. That is correct, yes.

Q. And that makes the inter-territorial rates higher than the C. F. A. rates?

A. For the longer distances, yes. I believe that for the right short distances the Commission in those cases prescribed the Southern scale.

Q. This is true, isn't it, that in the Southern fertilizer case, in 113 I. C. C., the Commission fixed the fertilizer rates?

A. I can't give you that, I will take your word for it if that is the case.

Examiner McGrath: The reports in those cases speak for themselves; it doesn't make any difference what the Commission says about them.

A. I will say the Commission fixed the fertilizer rates in Southern Territory. I can't check you on the page nor the number of the report.

Q. In the Ohio Farm Bureau Case——

Mr. Reynolds: I don't think it is proper cross examination to ask him about the fertilizer case in great detail, Mr. Examiner.

Examiner McGrath: Do you object to it?

Mr. Reynolds: Yes sir, I do.

Examiner McGrath: The objection is sustained.

Mr. Day: I am permitted to ask leading questions on cross examination.

Examiner McGrath: That is not the ground on which I sustained the objection. You are questioning him about [fol. 448] the Commission's reports. The reports speak for themselves.

Mr. Day: I know, but I am not through with cross examining the witness on what he has stated. He made the flat assertion that the rate levels are as low as or the same in Southern Territory as they are in the North.

Mr. Reynolds: He didn't make any such assertion.

Mr. Norman: He said on some commodities it was.

Mr. Day: Mr. Widell's question went directly to the general question of whether there were any rates fixed by the Commission on any commodities inter-territorially that were higher than they were within C. F. A. Territory.

Mr. Widell: No, Mr. Examiner, that was not my question. I am afraid counsel has entirely misunderstood it.

Examiner McGrath: As I said before, the Commission's reports will speak for themselves, and I can't see anything to be gained by asking this witness what the commission has done.

Mr. Day: I can't test the witness' knowledge in any other way.

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Examiner McGrath: You don't have to. If you want to rebut his testimony by stating the citations, by citing those cases, you are at liberty to do so.

Mr. Day: Well, I certainly want to cite the Ohio Farm Bureau case, Fertilizer Case, I. & S. 3151, and the numerous cases following it, in which the Commission did fix a higher level of rates inter-territorially from the South to the North than fixed within the C. F. A. Territory.

Examiner McGrath: You are at liberty to do that. Are there now any further questions on cross examination?

[fol. 449] Cross-examination.

By Mr. Norman:

Q. Mr. Burke, you were asked about your Exhibit No. 19, and in the question asked you, it was stated that the rates in C. F. A. Territory on the amosite, a competitive commodity, which was the basis for fixation of the rates on asphaltic limestone were 20 per cent lower than the rates on coke in C. F. A. Territory. Approximately what is the difference in the scale which you propose here on coke, the C. F. A. Scale, and the rates fixed by the Commission on processed asphaltic limestone?

Mr. Burke: The rates on coke, shown in the first rate column of my Exhibit No. 19 appear to be approximately 120 per cent of the rates on processed asphaltic limestone, shown in the last column of the exhibit.

Mr. Norman: That is all. That is all, Mr. Examiner.

Examiner McGrath: Are there any further questions? (No response). Mr. Burke, you say that the carrier which you represent,—principally the N. C. & St.L., is that correct?

Mr. Burke: Yes sir.

Examiner McGrath: Favors the adoption of the C. F. A. Scale from Chattanooga to Illinois territories on coke?

Mr. Burke: Yes sir.

[fol. 450] Examiner McGrath: Do you propose or suggest that scale as a maximum, reasonable scale, transportation conditions alone considered?

Mr. Burke: No, with competitive conditions considered also.

Examiner McGrath: Did you understand my question? Read the question. (Question read.)

Mr. Burke: If I understand your question, we propose in that scale to meet the competitive situation that we are told by our manufacturers exists in the Northern Territory.

Examiner McGrath: You are proposing that as something less than a maximum reasonable scale, transportation conditions considered; is that correct?

Mr. Burke: Yes sir, we think the scale is within the realm of reasonableness.

Examiner McGrath: But less than maximum?

Mr. Burke: Less than a maximum reasonable rate.

[fol. 451] Mr. Mohr: Would an answer similar to that be true of the rate level which you are maintaining at the present time in Southern Territory, that the rates in Southern Territory today are on less than a maximum reasonable level?

Examiner McGrath: That is on coke, you mean?

Mr. Mohr: Yes, that is on coke, that is what I mean.

Mr. Burke: That is my opinion, yes sir.

Mr. Norman: But within the zone of reasonableness.

Mr. Burke: But still within the zone of reasonableness, yes sir.

Examiner McGrath: I don't see Mr. Behring here today. Mr. Burke, I would like to ask you one further question. Can you tell us from your own information whether coke is produced on the line of the Southern; or that is, the C. N. O. & T. P., at any points other than Chattanooga?

Mr. Burke: By-product coke?

Examiner McGrath: Yes, by-product coke.

Mr. Burke: I know of none on the C. N. O. & T. P. north of Chattanooga.

Examiner McGrath: Chattanooga is the only producing point of by-product coke on the C. N. O. & T. P.?

Mr. Burke: To the best of my knowledge, yes.

Mr. Norman: Birmingham, though, the Southern serves Birmingham.

Mr. Burke: He said the C. N. O. & T. P. That is the A. B. S.

Mr. Norman: Oh yes, that is the A. G. S. That is correct, the A. G. S.

[fol. 452] E. R. Rose testified for Louisville & Nashville Railroad, protestants, as follows:

Direct examination.

By Mr. Mohr:

I am assistant to the Vice-President in charge of traffic for the Louisville & Nashville Railroad, and I am testifying in this proceeding for the Louisville & Nashville Railroad only.

Coke is manufactured and shipped to commercial markets at the following points on the L. & N.: Beehive coke is manufactured and shipped from ovens located in Wise County, Virginia. By-product coke is manufactured at and shipped from points at and in the Birmingham District, known as Tarrant, North Birmingham, Thomas and Woodward. By-product coke was formerly manufactured and shipped from Ensley, Alabama, but it is no longer manufactured at that point. Some years ago by-product coke was manufactured at Alabama City and at Holt, Alabama. Pig iron blast furnaces located at Alabama City formerly engaged in the production of coke, but have now been idle for two or three years. In fact, some time ago, in order to meet their furnace requirements, they found it necessary to buy a small lot of coke and ship it into Alabama City. As to Holt, the Central Iron & Coal Company, which formerly manufactured the coke at that point, has not been in operation for several years, but they have a stock of coke on hand which, I understand, they have been using in their pipe plant at Holt, and they have also sold some of this coke commercially. However, I have checked the records back to April 1930, and out of the total movement of 94 cars which moved from Holt over the Louisville & Nashville Railroad, not one shipment was made to the Ohio River crossings, or to points in I. F. A. or C. F. A. Territories.

[fol. 453] Q. Did the Louisville & Nashville Railroad voluntarily subscribe to the rates under suspension in this proceeding?

A. The Louisville & Nashville caused to be published for its account the rates under suspension only at the direction and insistence of our northern connections.

Q. Do the rates under suspension conform with the L. & N. Railroad's judgment as respects a proper adjust-

ment in all of the circumstances, from southern coke manufacturing points to C. F. A. Territory?

A. No sir, the suspended rates are not looked upon or regarded as a proper adjustment on coke from the South to Official territory.

Q. State briefly the position of the Louisville & Nashville Railroad in this proceeding.

A. The present rates on coke to Official Territory from Alabama and southwest Virginia, which the suspended rates would displace, are rates which have been in effect for some years; they are rates which have moved a fair amount of traffic in the past, and since we believe them to be not unreasonable or discriminatory, we feel that the present interterritorial rates from the South should be continued. We feel that we should have a free hand to make rates or negotiate for rates from the South to the North on a competitive basis, as conditions in our judgment may warrant, just as we have heretofore done. We think that this is our right as long as the rates we maintain are within the law, and are not unreasonably low or unduly preferential. As already stated, we feel that the existing rates, which have moved traffic in the past, conform to this principle and should not be disturbed at this time.

[fol. 454] Exhibit 22 shows the present rates, rates under suspension, rates made on basis of the I. & S. 3511 Column 2, and Column 3 scales for the distances from Birmingham to certain destinations in C. F. A. and I. F. A. territories. Substantially all destination points named in this statement are points to which there has been a movement of coke within the immediately preceding thirteen months.

I. & S. Docket 3511 Column 2 scale is the scale which the Commission found to be reasonable for application between points in C. F. A. territory, and I. & S. Column 3 scale is the scale which the Commission found produced maximum reasonable rates from Alabama producing points to destinations in the States of Illinois, Indiana, Ohio and Southern Michigan.

Before somebody else calls attention to the fact, I want to mention that I have shown in these statements, that is, these exhibits, twenty-two or twenty-three destinations in Illinois Freight Association territory, such points being located in the State of Wisconsin, having in mind at the time I called for this data that both C. F. A. and I. F. A. territory were fully involved. In other words, there are some points

perhaps in this statement that are not involved in the suspension proceedings.

I have called attention to the fact that the present rates from Birmingham to destinations involved in this proceeding are, in all cases, within the range of those two scales. That is to say, to the destinations involved in I. & S. Docket 2985 the present rates from Birmingham are no lower than the Column 2 scale, and no higher than the Column 3 scale, and we feel that the present rates are not unreasonably low, nor discriminatory under Section 3.

[fol. 455] Exhibit 23 shows rates from active shipping points in southwest Virginia. In some cases the present rates from southwest Virginia are less than the I. & S. 3511 scale, but in the majority of cases the present rates, like those from Birmingham range between the Column 2 and Column 3 scales prescribed in that docket.

[fol. 456] This statement, as will be seen, contains a number of destinations to which no specific rate is provided in the suspended tariffs. The destinations opposite the "X" reference shown under the heading of "Suspended Rate" were omitted as specific destination points in the suspended tariff by reason of the fact that the movement of coke from these Southwest Virginia points to such places has ceased, there having been no shipments to such points from Southwest Virginia within the last four years.

As explained under the caption of "Explanation of References" on page 2, to points bearing reference "X", the intermediate rule or combination basis would apply, under the suspended publication. As to those points to which a specific rate was published in the suspended schedules, it is found that the average rate under the existing adjustment is $3.72 per net ton, and the average rate under Scale 2 to the same destination is $3.74 per net ton. In other words, on the average, to points to which a specific rate has been published in the suspended tariffs, the existing adjustment, taken as a whole, from Southwest Virginia is within 2 cents per ton of being the same as the C. F. A. Column 2 scale.

I should explain that in having this statement prepared, the same destinations were used from Southwest Virginia as shown from Birmingham in my previous exhibit, in order that the exhibits would be uniform.

Q. The points involved can be readily ascertained by looking under the column headed "Suspension"?

A. Headed "Suspension", yes sir. A mileage scale, unless it be a minimum scale, if rigidly followed, militates against the fixation of competitive rates, particularly in a situation as we have here, where far-removed producers are [fol. 457] undertaking to get into a market studded with plants producing the same commodity and able to reach this same market at very short rail hauls. As is well known, these by-product plants are scattered all over C. F. A. Territory. This close proximity of Northern producers to the points of consumption gives such Northern producers an enormous advantage over the Southern producers. The Southern producers, by reason of the greater haul involved in order to get their product to the Northern market, to begin with, encounter a natural handicap in distance, but we feel that this disadvantage should not be compounded by requiring Southern shippers to pay a freight rate which, for their longer haul, is disproportionate to the freight rate assessed against the shipper in close proximity to the markets having the natural advantage in distance.

As we view it, the construction of the mileage scales prescribed as Column 2 and Column 3 in I & S. Docket 3511, has the effect of preferring the short haul shipper, and that is equivalent to saying that the application of either of these scales penalizes the long haul shipper to the advantage of his short haul competitor.

In support of the correctness of the statement just made, I want to file, at this time, a 17 page exhibit, identified as respondent's Exhibit No. 24, consisting of as I say, 17 pages. This is a statement showing the mileage scale rates prescribed by the Commission on various commodities, as well as classes, for representative hauls of 150 miles and less contrasted with rates under the same scale for representative hauls of 400 miles and over. I have taken as representative short distances the hauls for 10 miles, 20 miles, 40 miles, 60 miles, 80 miles, 100 miles, 120 miles, and 150 miles. As representative of the long distances, I have [fol. 458] taken hauls of 400 miles, 500 miles, 600 miles, 700 miles, and 800 miles. Sheets 1 to 3, inclusive, of this exhibit show comparison of rates for the short line hauls already referred to with the long haul distance of 400 miles; sheets 4, 5, and 6 show the same kind of a comparison for 500 miles, and each unit of three sheets through sheet number 15, which follows, shows the comparison for 600, 700 and 800 miles.

I have numbered each one of the scales shown on each sheet and these correspond throughout the exhibit and the application of each of these scales is explained by number on pages 16 and 17 of the exhibit.

It will be seen that the scale marked 1 and 2 throughout the exhibit is, in all cases, the Columns 2 and 3 scales prescribed in I. & S. Docket 3511. The purpose there is of course to compare the relative rates, rate differences, and the percentage relationship for the different lengths of hauls shown on coke as prescribed in I. & S. Docket 3511, versus rates on other mileage scales.

The last four lines at the bottom of each sheet set forth the first class under the Southern Class adjustment, the Eastern Class rate scale, the Western Class scale, and the Southwestern class scale. Each comparison is made up of four columns. Looking at the first sheet, we find in the first column under these mileage scales the rate for 10 miles, and in the second column the rate for 400 miles.

In the third column there is shown the increase in rate which is reflected in the application of the different scales for the longer distance over the shorter distance, and then in the fourth column there has been set forth the percentage increase under the scale for the longer haul over the shorter haul. In the second group of columns on page one [fol. 459] 400 miles has been compared with 20 miles, and in the third group of columns, 400 miles has been compared with 40 miles, and this is the plan of the exhibit to, and including, page 15.

This comparison is not limited to scales which apply in Official Territory or in Southern Territory, or to scales which apply interterritorially between those territories, but, as will be seen from reviewing pages 16 and 17 of the exhibit, scales applying in all territories, except the far-west territory have been selected. Further, the scales used in this comparison are applicable to those commodities which generally move on scale rates. I intentionally omitted from the exhibit scales applicable on potatoes and bananas and other commodities which usually, as a general thing, take specific or group rates. I also omitted scales which apply to such commodities as stone, salt, cottonseed, and its products, and creosote oil, and other items which have been treated in general revisions and related to the class rate structure.

The figures of particular importance throughout this exhibit are those shown in the fourth, eighth, and twelfth columns. To point specifically to the result of this comparison, observe page 1, column 4. The percentage shown in that column is the result of dividing column 3 by column 1 and it shows that the increase in the rate on coke under the I. & S. 3511 Column 2 scale, 400 miles, compared with 10 miles, is 272 per cent.

Under the Column 3 scale, the increase for these distances is 270 per cent. In casting the eye down Column 4 and looking at the percentage increase, 400 miles versus 10 miles, on these other scale rates, it will be seen that there are only 11 cases where the percentage is as high, but [fol. 460] in the remaining 34 scales shown on this page, the rate for 400 miles bears a lower per cent of the scale for 10 miles than do either of the coke scales prescribed by the Commission in Columns 2 and 3 of I. & S. 3511.

I want to mention the fact that in a number of the scales used in this exhibit, the application of which is given on pages 16 and 17, have been prescribed as the interterritorial measures between South and North.

Q. In connection with your Exhibit No. 24, before you get to 25, is it a correct understanding of the showing in that exhibit, to arrive at the conclusion that the gradations in the rates resulting from the scale prescribed for application in the North is to favor the short haul shipper to the disadvantage of the long haul shipper?

A. Yes sir, I prefaced my introduction of this, and stated that was the purpose of it.

Q. All right, proceed.

A. My final exhibit, No. 25, is merely a detailed analysis of the exhibit I have just submitted, or rather a recapitulation showing the extent that the comparative scale rates produce increases—short haul versus long haul—which in percentage ratio are less, greater, or the same as those reflected in the I. & S. 3511 coke scale.

By Mr. Norman:

Q. Mr. Roby, I notice on your Exhibit No. 24, that you compare on page 1, for example, where you compare the per cent with the various scales for 400 miles, or with the same scale for 20 miles, it appears that the Column 2 and Column 3 coke scales are practically the same percentage,

and that seems to be true with respect to all these short distances, but when you get over here to the long distances, [fol. 461] for example, where you compare the per cent 500 miles with 100 miles, on page 5, the scale 3 seems to be a considerably larger percentage, 500 miles over 100 miles than Scale 2. Why is that, do you know? For instance, there it is 114, on page 5, it is 114, scale 2; it is 124 scale 3 as shown there.

A. That didn't occur to me, Mr. Norman. I can only say that it is stepped up, the Column 3 scale is stepped up, a greater increase for longer distances than the Column 2 scale, and that is probably what brings this effect about.

Q. So that under Column 3 scale, the long haul shipper is at a greater disadvantage with the short haul shipper than rates under Column 2 scale would make.

A. Yes sir.

Cross-examination.

By Mr. Keeler.

Q. With regard to the questions which counsel for the Southern producers has recently asked you with regard to the relationship there, between Scale 2 and 3 rates, you did not intend by your answer to indicate that there was a different scale, under Column 3 than under Column 2 in the sense that there was not a specific percentage relationship between the two, did you? You said the scale 3 was stepped up faster than scale 2. Scale 3 is a percentage relationship to Scale 2, is it not?

A. Not literally so, Mr. Keeler.

Q. Practically speaking, where you may dispose of fractions or something, which brings a slight variation in percentage relationships, but the two scales carry right along with each other in a definite percentage relationship, do they not?

A. You have a 15 cent per ton break in a number of cases, that is, in the Column 3 scale, with the correspond- [fol. 462] ing progression of 10 cents per ton in the Column 2 scale.

Q. Well, there is an exception, that is other than the rule, are they not?

A. They are not in the majority, exactly.

Q. What is that due to? You say some places you have a 15 cent gradation in one scale, and 10 cent gradation in

the other. What is that due to, the disposition of the fractions or something?

A. I don't know what it is due to. I had nothing to do with the construction of that scale, and I would rather not hazard a guess as to what it is caused by.

Q. Generally speaking, there is a definite percentage relationship between the two, is there not?

A. I would say in the aggregate they are; there probably is, taking all rates under both scales for all distances.

Cross-examination.

By Mr. Day:

Q. Mr. Roby, on your Exhibit No. 24, the cement scale 2, shown as No. 6,—I am looking at page 16 of your exhibit, at the description of the application of the various scales shown throughout your exhibit.

A. Let's see which one that is, Mr. Keeler. Column what is that?

Q. Scale No. 6, Exhibit No. 24.

A. No. 6.

Q. Yes.

A. Roman numeral, yes sir.

Q. That scale likewise applies in Illinois Territory, and in C. F. A. Territory on cement, does it not?

A. I couldn't tell. In Illinois Territory and in C. F. A. Territory?

Q. Yes.

[fol. 463] A. I don't know off hand, Mr. Day.

Q. You don't show what the C. F. A. amosite scale is either, do you, in connection with your showing of amosite scales on here?

A. You mean intraterritorially?

Q. Intraterritorially.

A. I didn't know that you had one; that is why it is not shown there.

Q. You didn't know there was one prescribed by the Commission you mean?

A. In C. F. A. Territory?

Q. Yes.

A. On amosite?

Q. Yes sir.

A. No sir, I didn't. I thought that was a southern product entirely.

Q. No, we have several cases in Official Territory on amosite. Now how about tar and pitch? The scale rates to be applied on tar and pitch in C. F. A. Territory has also been prescribed by the Commission, has it not?

A. I couldn't tell you whether it has or not. I might say now right here, Mr. Day, that there was not any intention to keep any of the scales out of this exhibit. I just had to find a stopping place somewhere, because it is an enormous task to work up and get it out as it has been worked out. I wanted them to be representative, so I took these.

Q. Iron and steel is a very important commodity in C. F. A. Territory, in the North, is it not?

A. Yes sir, I understand so.

Q. You didn't show the iron and steel scale in your exhibit, did you?

[fol. 464] A. No, but I think the cast iron pipe scale which I have shown is the same as the iron and steel scale, and that is shown under Column 25. I show that I think; I am rather certain of it.

Q. That is the same in C. F. A. Territory as the iron and steel scale, but the same application does not prevail on iron and steel to and from the South.

A. No sir.

Q. As on cast iron pipe?

A. No sir.

Q. The iron and steel rates interterritorially are higher than the cast iron pipe rates interterritorially.

A. They are not the same. I would have to compare them to see what they are.

Q. You didn't undertake to show the so-called White Provision (?) scale fixed by the Commission for interterritorial application on live stock?

A. No, there are several of those scales, but they start at 300 or 400 miles, and I couldn't get a comparison with the short distances that I am trying to make a comparison with in this exhibit.

Q. But they are interterritorial scales?

A. Yes.

Q. Designed for application from the North to the South in case of the live stock.

A. Yes, but they had no short haul rates, or rates under 300 miles.

Q. Has the Commission prescribed the basis of rates to be applied interterritorially on plaster and gypsum, a commodity which you show in Item 21 of your exhibit?

A. Interterritorially?

[fol. 465] Q. Between the North and the South.

A. We had a proceeding on that, but I think it was finally canceled on a compromise, but I am not certain, a compromise between the shippers and the carriers, I mean.

Q. Does the application shown for petroleum in item 29 of the exhibit mean that the same rates apply on petroleum between Southern territory as between Official territory points; is that the purpose?

A. We have some rates from producing and shipping points skirting the Ohio River, and from West Virginia too that have been based on that scale to our Southern territory, and it is the same scale as applies in Official territory.

Q. I am not clear from the description of the application on this exhibit on page 16. It reads "In and between Southern and Official territories, east of the Illinois-Indiana State Line." Now does that mean that it applies within Southern territory, within Official territory, and also interterritorially, between those two territories?

A. Yes sir, that report will speak for itself, of course. I probably made a mistake by not going into fuller detail in the description here.

Q. I had in mind, there was a different level of rates fixed for interterritorial application than for territorial application in those territories, and also a different level fixed for the South than for the North.

A. Well, that is not my understanding. Of course I am willing to have that correction made if that is true.

Q. You didn't undertake to show the interterritorial scale fixed by the Commission on fertilizer to accompany the showing on your Item 31, either, did you?

[fol. 466] A. I have got one fertilizer scale in it, and there is a pretty close relationship between the Ohio Farm Bureau and our Southern Fertilizer scale.

Q. I had in mind the interterritorial scale.

A. Well, that is not a scale, Mr. Day, that is a formula, and I would have to work out——

Q. It is what they call a laminated scale, isn't it?

A. Yes sir, it would be a different rate for the same distance, depending upon the amount of haul in the Southern compared with the Northern territory.

Q. Wasn't there some basis or scale of rates prescribed on silica sand from Northern territory to the South?

A. If there was, I don't know of it.

Q. There have been individual cases, though, in which rates have been prescribed to the South, have there not?

A. Yes sir, I think so. I think we have had a case assigned for two weeks from now, where that question I believe is involved.

Q. Is it a fact that the bulk of your tonnage to points north of the Ohio River has always moved to or in connection with the Illinois Central and the C. & E. I. Railroads?

A. The bulk of the L. & N. tonnage?

Q. On coke.

A. No sir.

Q. Where does it go, mostly?

A. We like to get the haul by Cincinnati, if we can get it, because there is our long haul junction.

Q. Yes, but isn't that insignificant compared with your movement through Evansville, in connection with the C. & E. I. for example?

A. Well, we work with other connections.

[fol. 467] Q. You work with other connections, but I am trying to get at the relative volume of the movement.

A. Well, Chicago and Detroit, I would say, are the biggest consuming points. Now I don't know which is the larger.

Q. You haven't made any study of the movement?

A. Only to the extent I took points to which there has been a movement in my Exhibit No. 22.

Q. Does this cover all of the destinations to which there was a movement?

A. It doesn't cover all of them. I tried to get a cross-section of the territory so it would be representative of the suspended adjustment.

Q. We may take it that there was some movement to every point shown on Exhibit 22?

A. Every one except 10 or 12, and there was a movement there, but I just didn't check it up to see, as to these 10 or 12 points.

Q. And it is true, is it not, that to a number of these points the Birmingham shipper will still have the benefit of his present low rates, regardless of the outcome of this case?

A. I don't quite understand your question. It is true, you mean, that the present rates will continue as long as they are not involved in this I. & S. Docket?

Q. As long as the Illinois Central, the C. & E. I., the Burlington, and other roads have elected not to follow the example of the C. F. A. lines in having these rates brought up to the scale prescribed by the Commission in Docket I. & S. 3511, that you and your shippers will still have the benefit of the present low rates, to all of these points reached by the Illinois Freight Association Lines, and the Western Trunk Lines?

[fol. 468] A. Well, I can't say that we will get any benefit out of that, because the L. & N. doesn't work very closely with the Illinois Central, we are competitors for this business. I assume that they will have an interest in maintaining their long haul, taking the coke from Birmingham to Chicago.

Q. Of course the Illinois Central is an important destination line in Illinois, and Indiana, but you know that these present rates will also be continued in connection with all of or with practically all of the Illinois Freight Association lines, and all of the Western Trunk lines, operating in Illinois, do you not?

A. Yes, sir, but I had in mind the rates which the Illinois Central alone was responsible for.

Q. The Illinois Central of course reaches Indianapolis?

A. Yes sir.

Q. And some intermediate territory in Indiana.

A. That is right.

Q. And controls the rate from Birmingham to those points, does it not?

A. Yes sir; and very likely would control the routing, that is the point I am making.

Q. The C. & E. I. likewise operates through Western Indiana, doesn't it?

A. Yes sir.

Q. For the entire length of the state.

A. Yes sir, part of it is through Eastern Illinois.

Q. Then in addition to that, you have the Burlington and the Northwestern, the Santa Fe, and the Rock Island, and the long line of Illinois lines with which present rates will be maintained.

[fol. 469] A. Yes sir.

Mr. Day: That is all.

Cross-examination.

By Mr. Cronk:

Q. When did the Ensley plant go down, do you know when that plant closed?

A. Well, it really is not down, in the sense that it has been razed. It is still there, I understand, but the Ensley plant was operated by the Semet-Solvay, and they have transferred their operations over to North Birmingham, at the Sloss-Sheffield plant.

Q. Did you mean to say that it would not be operated again as a coke producing plant?

A. That is my thought about it. I don't know whether I am right about it or not. They have probably a better plant at North Birmingham.

Q. Do the present owners produce commercial coke at the Sloss-Sheffield plant?

A. Yes sir.

Q. Where is the plant?

A. At North Birmingham.

Q. Mr. Roby, on your exhibit No. 24, is every scale that you have indicated there, can it be told whether it is a scale applying from the North to the South, have you marked every scale that does apply?

A. Well, I don't believe I have, Mr. Cronk.

Q. I notice on cast iron pipe you make a note, Southern Territory to C. F. A. Territory. Are there other scales which apply from the South to the North which you have not indicated there also?

A. Yes, there are, and I will indicate them to the best of my knowledge at the present time, but, understand, lots of times in specific complaints, the equivalent of these [fol. 470] scale rates apply for interterritorial application, or rather sometimes, whereas the entire scale may not be adopted, but I will call to you now those cases where they apply interterritorially. Looking at page 16, the scale No. 5, cement, scale 13, lime, scale 17, asphaltic limestone, scale 29, although Mr. Day has questioned that, I will clear that up if I am given time; scale 36.

Q. Your exhibit 24, as I understand your testimony, and the study of the exhibit, is designed to show that the scale, scale 3 grades up too rapidly on the long hauls, to be applicable as a scale to apply from the South to the North?

A. It shows, it is proof, at least to my mind, that it is out of kilter, long haul versus short haul, with other scales that the Commission has prescribed.

Q. Now do you think that, and your conclusion from that is it is not a suitable scale to apply to this particular commodity?

A. Not under the circumstances, no.

Q. Not under the circumstances?

A. Because we have, as I cited here, these people are down South with a natural very heavy natural disadvantage, taking 400 miles to get to the Ohio River.

Q. Well, you are going to talk about the competitive conditions of marketing coke in the North.

A. I am going to talk about what the long haul scale does to the producers.

Q. You say it is not satisfactory. Could you shorten it by saying on account of the competitive conditions that exist in marketing coke?

A. Well, that is the effect of it, yes sir.

Q. That is what it gets down to in the final analysis, isn't it?

A. Yes sir.

[fol. 471] Q. Now if the competitive condition did not exist, then would your judgment as to the progression of the scale be affected in any way? Suppose, for instance, the coke was produced in the South altogether, and none produced in the North, so you would have no competitive condition in marketing coke in the North, would it affect your judgment as to what the progression of the scale should be?

A. I would still think that it was a mighty poorly progressed scale, that it is something unusual, and not in keeping with the progression in other scales, whether there is any competition or not. Of course it wouldn't mean anything if there is no movement, and no possibility or probability of movement for those long distances, it would just be a paper scale under those circumstances.

Q. You would have to consider the measure of the rate then, would you not?

A. Yes sir.

Q. You would not pay much attention to the progression if there was no competition, you would not be——

A. I say then it would be a paper rate, and you wouldn't care what the progression was, as long as it was just a paper rate, no.

Q. But you would be interested in the measure of the rate from your origins to the North.

A. Always, yes sir.

Q. Could I say this then, Mr. Roby, that your views that the rate progresses too high relatively with the Northern scale is brought about solely by reason of the competitive conditions which exist in marketing coke?

A. I have already said I didn't have anything to do with this scale, I didn't know what was in back of its construction; I just don't know.

[fol. 472] Q. Could I say this then, Mr. Roby,—I am not asking that, you misunderstood my question. I said your view of the scale, to the extent that it progresses too high, is brought about, or your criticism is brought about solely by reason of the fact there is a competitive condition in marketing coke beyond the River?

A. It is brought about because our shippers have to pay it, the shippers I am particularly interested in, or that are on our line.

Q. They have to pay it, in competition with some other shipper in the North?

A. Yes sir.

Q. It is a competitive condition that brings about your criticism of the scale, isn't it?

A. It is the fact we rather believe that it will interfere with the movement of coke, probably might prevent the movement of any coke from the South to the North.

Q. That is because of the competition, isn't it?

A. Yes.

Mr. Cronk: Exactly. All right, thank you sir.

Cross-examination.

By Mr. Holopeter:

Q. Please refer to your Exhibit 22; I would like to ask you a question on that. Do we understand the rates you are proposing to be substituted for the suspended rates will be ones found in the column headed "Column 2" on that exhibit?

A. No, you have misunderstood me.

Q. Then what is your proposal?

A. Just what is shown there as present rates.

Q. You propose for the present rates to be continued in effect do you?

A. Yes.

Q. In every case?

A. Yes.

[fol. 473] Q. Even though they may be lower than the rates shown in Column 2?

A. I told you none of them were lower, in the case of that exhibit you have before you. They would range in between Column 2 and Column 3 rates, if continued.

Examiner McGrath: Is that exhibit designed to be representative of all destinations; is that true so far as your investigation shows?

Mr. Roby: Yes sir.

Examiner McGrath: As to all destinations?

Mr. Roby: Yes sir.

Examiner McGrath: So far as Birmingham as an origin is concerned.

Mr. Roby: Yes sir.

Examiner McGrath: Or the Birmingham District?

Mr. Roby: Yes sir.

Examiner McGrath: Pardon me for interrupting. Proceed.

Q. Now on your proposed rates there, you propose a rate to Ann Arbor, Michigan. Then——

A. Wait a minute, Mr. Holopeter. I am not proposing anything, I am trying to support the existing, present rates, the rates that the suspended rates would displace if they became effective.

Q. All right. Then you would have a present rate to Danville, Illinois, of $4.25 for 521 miles, and two lines below it you have a rate to Decatur, Illinois, very close to it, 518 miles, $4.30. What is your justification for that difference in those two rates?

A. I think that difference could exist. We put these rates in to move traffic, and then accomplish that that way. Now if there is a slight variation, and they are not on any hidebound scale, I don't think that is improper.

[fol. 474] Q. This $4.25 rate to Danville, Illinois was put in March 15. Was that put in to move traffic; has that moved traffic since that time?

A. Well, I don't know whether it has or not. I will say this, that Danville is one of the points to which there has been a movement. I don't know whether the movement occurred since March 15, or prior thereto, but it occurred during the last 13 months.

Q. Then I also believe I understood you to say all destinations shown on your Exhibit No. 22 are destinations to which you have had a movement from Birmingham?

A. I said substantially all. There may be 10 or 12 points here that I filled out that I can't say as to those for sure, whether there has been a movement, but there may have been a movement, even to those points.

Q. You show some Wisconsin points in your exhibit, which are outside of the issue here. Why were those put in? Is that because you had a movement?

A. I explained that. You apparently were not here when I introduced this exhibit and explained that my conception of the issues at first was that all rates, rates to all points in I. F. A. and C. F. A. were involved, and these Wisconsin points are in I. F. A. Territory. I didn't want to rewrite the exhibit to omit those points. There has been a movement to those Wisconsin points.

Q. Just one more question then. You show a distance mileage to Anderson, Indiana, 513 miles from Birmingham. The present rate is $4.30, and you show Column 3 rate $4.25, in the last column. Is it not a fact that the present rates, this $4.30 rate, was intended to be put in on the Column 3 scale?

[fol. 475] A. Yes, I am glad you called my attention to that. There are a number of errors in that respect. Some of these present rates, I think just by reason of the mistakes in distrance of the tariff compiler, are 10 cents higher than they would be on a literal application of the scale.

Q. Who compiled those distances?

A. The Southern Freight Association.

Q. The Southern Freight Association. And you show your distances being used here as I. C. C. 13494 distances to the River, is that correct?

A. That is correct.

Q. Is it your position that the Column 3 scale prescribed by the Commission in Docket 3511 permitted you to use the distances which you used in Docket 13494?

A. I think so.

Q. The 3511 scale ordered you to use the shortest possible distance via existing connections, did it not?

A. Yes, and so did the 13494 scale.

Q. But you have a grouping in 13494, do you not? That is at the Ohio River?

A. We work from Birmingham, so the grouping wouldn't make any difference. Birmingham is the group point, anyhow.

Q. To shorten the matter, in case the mileage figured by the formula prescribed in Docket 3511 made a different distance than that figured by use of the 13494 basis, you would of course say that the former should be used, would you not?

A. I think the Commission's order ought to be complied with anyway, in that——

Q. That is all.

A. —or in any other case now.

Q. All right, that is all.

[fol. 476] A. I don't say that it is not here.

Examiner McGrath: Are there any other questions?

Cross-examination.

By Mr. Orcutt:

Q. Mr. Roby, as I understand your testimony, it was all designed and directed to your apparent belief that the Commission was wrong in fixing the scale it did for interterritorial application in I. & S. 3511?

A. I think that it is an improperly constructed scale, Mr. Orcutt, yes sir.

Q. You think that it is all wrong, and your whole testimony was directed to that?

A. You can judge that for yourself.

Q. I so judge it, and I am asking if I am correct in that conclusion.

A. I think that you are in the main correct, yes.

Mr. Orcutt: And that is in spite of the fact that the Commission has refused to reopen that case for rehearing. That is all.

Examiner McGrath: Is there anything further on cross examination?

Mr. Day: On your Exhibit No. 22, as a matter of information, is Lockford the correct name of the town on the 6th item from the bottom of page 1 of the exhibit?

Mr. Roby: Thank you, Mr. Day, that should be Rockford. Now suppose we correct on the first page the 6th name from the bottom. It should be Rockford instead of Lockford, on Exhibit No. 22.

Examiner McGrath: Are there any further questions on cross examination? (No response) All right, Mr. Mohr.

[fol. 477] Redirect examination.

By Mr. Widell:

Q. With respect to the questioning as to rates to Illinois Territory, under control say of the Illinois Central and the Illinois lines, specially those serving Birmingham, and while those rates as you said would remain in, and are not affected here, is it not true from your own knowledge that when you go east of Chicago, or east of Indianapolis, the territory east of these influences referred to, that there you have a large, fairly large movement, at least from Birmingham, in which you are directly interested, so far as the level of the rates is concerned?

A. Yes sir. I think my statement No. 22 shows that to be correct.

Q. In other words, Southern Michigan is an important consuming territory, so far as you are concerned?

A. Yes sir.

Q. And Indiana and Ohio.

A. Yes sir.

Q. Thank you.

A. That is the Eastern section,—I mean the western section of Ohio.

Mr. Widell: Yes, Thank you.

Redirect examination.

By Mr. Mohr:

Q. Do you know of any reason why there should be a higher level of rates from the Birmingham District to Indiana points than to Illinois points?

A. No, I do not.

Q. With respect to Exhibit No. 22, and the illustrations there, to the extent that they are rates at present in effect higher than the Column 3 rates, is it the desire of the Louisville & Nashville Railroad to maintain rates higher than the maximum reasonable rates prescribed by the Commission in this case or not?

A. No sir.

[fol. 478] Q. You were asked by counsel for the Northern lines regarding quite a number of interterritorial rates that the Commission fixed, one of them being on live stock. Did the Southern carriers in the live stock case to which he re-

ferred advocate the destination level for interterritorial application in the live stock case, or did they advocate a combination basis in that instance?

A. Mr. Mohr, I am sorry, I hate to admit it, but I really do not know at this time.

Q. I thought that you were in those cases.

A. No sir.

Q. Would your answer be the same if I asked you regarding the other cases in most instances? Were you in any of those, or all of them?

A. I was in the interterritorial fertilizer case.

Q. What was the situation there? Did the Southern carriers advocate the destination level there, or did they advocate combination in that case?

A. Well, in that case, we were dissatisfied with the destination level ourselves, but later we subscribed to the destination level, and in a number of cases since then, as I think most of us know, we have defended rates and suggested to the Commission the destination level from the North to the South in a number of interterritorial rates.

Q. Is that an unusual position for the Southern carriers to take with respect to commodities manufactured or produced in the South, to insist upon the destination level of rates in connection with those?

A. That is our position as a general thing.

Mr. Mohr: That is all, Mr. Roby.

[fol. 479] Recross examination.

By Mr. Day:

Q. And the basis you advocated in those cases from the North to the South as the destination level always would result in higher rates than applied within C. F. A. Territory; is that correct?

A. You mean in the fertilizer case?

Q. Yes.

A. Yes, because the C. F. A. level was lower than the Southern level on fertilizer.

Mr. Mohr: The destination level was lower than the Southern level?

Mr. Roby: Yes sir, lower than the Southern level.

Q. Mr. Mohr asked you about any reasons for lower rates in Indiana than in Illinois. Don't you know, as a matter of

fact, that the general rate level, that the general rate structure in Illinois is lower than it is in C. F. A. Territory?

A. That is true as to class rates, I think.

Q. That is true as to class rates?

A. Class rates.

Q. Isn't it true as to commodity rates?

A. I couldn't tell.

Q. And if it is true, isn't it because the Illinois situation is dominated by Western and Southern railroads?

A. That is true, yes.

Q. That is all.

A. But what I mean to say, Mr. Day, was that there was not any difference between going into Indiana over the C. & E. I. or Illinois Central,—as compared with going into Illinois over the Illinois Central.

Q. There is not any change contemplated by either road between Illinois on the one hand, and Indiana on the other, is there?

[fol. 480] A. No sir.

Mr. Day: That is all.

Redirect examination.

By Mr. Norman:

Q. The Southern carriers have advocated the destination level in both directions, haven't they?

A. Oh yes.

Q. That is to say that when the traffic comes from the North into the South you have advocated the Southern level, and when it goes from the South into the North, you have advocated the Northern level?

A. That is correct.

Mr. Mohr: That is also true of the West?

Mr. Roby: Yes sir.

Mr. Day: You mean then you advocate a different level of rates when the traffic moves south than when it moves North do you?

Mr. Roby: It does result in that, yes sir.

Mr. Day: Is that distinction made on account of any difference in transportation conditions in the two directions?

Mr. Roby: No sir.

Mr. Day: That is all.

Mr. Roby: It is due to the competitive conditions.

Mr. Widell: Just one question. Did you hear the testimony about the southbound movement of coke from C. F. A. to the South yesterday?

Mr. Roby: You mean Mr. Bissell's testimony?

Mr. Widell: Some reference was made to the fact, as you perhaps recall, that the Northern producers cannot reach the South. Did you hear that?

Mr. Roby: Yes sir.

[fol. 481] Mr. Widell: Have the Southern carriers, or at least the L. & N., which you represent, any objections to the establishment of rates from the North to the South to move that traffic, Mr. Roby?

Mr. Roby: On the destination level, no sir, we have not, but I don't understand that there is any traffic to be moved there.

Q. All right.

A. There is no consuming market in the South.

Q. That may be true, but I mean as a general proposition, would Southern lines be willing to join the Northern lines in rates for that if they were requested to do so?

Mr. Roby: I think that would be the position of our company, the L. & N. Railroad.

Mr. Day: You are not able to say definitely though, are you?

Mr. Roby: No, I am not the rate making authority.

Mr. Day: It would have to be submitted to your management wouldn't it?

Mr. Cronk: In connection with Mr. Norman's question that you always advocated the destination level of rates,—is that true, Mr. Roby?

Mr. Roby: That is true, yes sir.

Mr. Cronk: I don't know anything about your rates on this commodity that I am asking you about, but of course we know there is no cotton grown in the North, and there is cotton grown in the South. How about the rates on cotton. There are rates in the North on cotton. Are the overhead rates higher or are they lower than within Central Territory?

[fol. 482] A. I assume of course that the rates in the Central Territory are nothing more than the class basis. It is an abnormal level there.

By Mr. Cronk:

Q. Well it is much lower than your overhead rates, isn't it, from the South to the North?

A. You mean the C. F. A. rates are much lower than the overhead rates from the North to the South?

Q. Yes sir.

A. No sir, I haven't checked it.

Q. I was just wondering if you did. I don't either. I was wondering if your statement was correct in all respects, or if you meant it just as a general basis.

A. I think Mr. Norman meant when there is production of the same commodity in the two territories.

Mr. Norman: Yes, that is right.

A. An inter-territorial movement, as against an intra-territorial movement.

Mr. Norman: Yes.

Q. You mean that it is true only where there is a competitive situation in the destination territory; is that right?

A. Yes sir.

Q. Is that right?

A. Yes sir.

Mr. Cronk: That is what I thought.

Examiner McGrath: Are there any further questions now? (No response) I have just a few questions. You stated in answer to a question by counsel, your counsel, that where rates from Birmingham to C. F. A. destinations are [fol. 483] now higher than the Column 3 rates, the maximum reasonable scale prescribed by the Commission, your company proposes or is willing to reduce those rates to that level. Is that correct?

Mr. Roby: That is right.

Examiner McGrath: Now what is your position with respect to the rates from the Virginia producing points to C. F. A. Territory, where those rates are now less than the Column 2 rates of the C. F. A. Territory?

Mr. Roby: To continue those rates, like we have suggested from Birmingham.

Examiner McGrath: Continue the present rates?

Mr. Roby: Yes sir.

Examiner McGrath: Even though they are less than the C. F. A. rates?

Mr. Roby: They are, but not on the whole. There may be cases where——

Examiner McGrath: What is your justification for that, briefly?

Mr. Roby: My justification is that we don't see any reason to junk an adjustment that has been in effect a number of years, that has moved traffic, and displace it by a scale, or a level which we think is improper, an improper level so far as this relationship, long haul versus short hauls, are concerned.

Examiner McGrath: From those origins then, you would maintain, from certain origins to certain destinations, a lower level of rates than that in effect in C. F. A. Territory?

A. From Wise County, Virginia——

Examiner McGrath: Yes sir.

[fol. 484] Mr. Roby: Yes sir, you would, but not on the whole, you wouldn't, Mr. Examiner. The comparison is, taking all of the rates for which there is a suspended rate shown, the difference between the present rate, which we would have continued, and the rate under the Column 2 scale, would be but two cents,—$3.72 under the existing adjustment, that would be the average rate, as compared with $3.74 under the Column 2 scale.

Examiner McGrath: You have used now, in your exhibits, Exhibit 22, for instance, distances from Birmingham.

Mr. Roby: Yes.

Examiner McGrath: In comparing the rates. Are those distances representative of the distances from all producing, coke producing points in the Birmingham District?

Mr. Roby: Yes sir, they are. I think that I have some distances here——

Examiner McGrath: If your investigation so shows that, that will be sufficient.

Mr. Mohr: State the approximate location of the points on your line in the Birmingham District.

Mr. Roby: One of them is northeast of Birmingham.

Mr. Mohr: How many miles, do you know, about?

Mr. Roby: About four miles, I think.

Examiner McGrath: What specifically are the Birmingham District coke producing origins?

Mr. Roby: I have named them, but I will be glad to name them again.

Examiner McGrath: If you have already named them, that will be sufficient.

Mr. Roby: Yes sir, I did.

Examiner McGrath: Is Alabama City one of them?

[fol. 485] Mr. Roby: That is not a Birmingham District origin.

Examiner McGrath: It is not?

Mr. Roby: It is a producing origin, or it was. It used to be, but there hasn't been any manufacture of coke there for some years.

Examiner McGrath: Has the plant there been dismantled or not?

Mr. Roby: No, sir.

Examiner McGrath: Is there any prospect of a further movement there?

Mr. Roby: I wouldn't say. There is a big steel plant there. They have to make coke for their steel plant, and if times ever get better, I suppose they will try to get back into active operation. Their only manufacture of coke is in the production of steel now.

Examiner McGrath: At the time they were in operation did they ship coke commercially, for commercial use?

Mr. Roby: They have, I believe they shipped furnace coke. I don't know whether they shipped foundry coke or not, but they have no crusher there, and do not ship domestic coke, or what is known as house size coke.

Examiner McGrath: Are there any other producing points in the same vicinity as Alabama City taking the same rates as Alabama City?

Mr. Roby: No, sir.

Examiner McGrath: My questions are prompted by the showing made on Exhibit 4 of Witness Behring.

Mr. Roby: Yes, sir.

Examiner McGrath: Which shows the rates and distances from Alabama City.

Mr. Roby: Yes, sir.

Examiner McGrath: That is all the questions I have. Is there anything further from this witness? (No response.)

[fol. 486] A. L. HOLTON testified on behalf of protestant Interstate Railroad Company as follows:

Direct examination.

By Mr. Mohr:

I am Vice President, Interstate Railroad Company, which is located in Wise County, serving coke ovens producing Beehive coke only. Our position is exactly the same as that of the Louisville & Nashville Railroad which railroad publishes our rates, and we are perfectly willing to join with that line and its connections in maintaining the present rates. The beehive coke produced at ovens on the Interstate Railroad in the past has been quite a factor, and at one time was, the origins on our line were the principal source of supply, one of the principal sources of supply of coke in the C. F. A. territory, previous to the advent of the later and more up-to-date by-product ovens.

Exhibit 26 is a tonnage statement showing the deliveries of coke for the years 1912 to 1933, inclusive, to the L. & N. Railroad. Practically all of the coke back of 1929 and perhaps 1930 went to C. F. A. territory, Chicago, and South Bend, Wisconsin destinations, and so forth. Most of it was delivered to the L. & N. Railroad, and that was the only outlet we had to C. F. A. territory, or rather the only routes that we had.

The tonnage has gotten to be very small and Exhibit 27 shows the total amount of coke shipped for the year 1933 from beehive ovens on the Interstate Railroad to the destination points in the involved territory. The total number was 2599 tons. The total of all coke that went to all destinations north of the Ohio River for the year 1933 was less than 3000 tons. We have no other shipments of coke besides beehive oven coke. There is no by-product coke.

The rates which the L. & N. has been forced to withdraw or cancel, or propose to cancel from points on our line against its will and at the instigation of the principal C. F. A. lines, are rates that have been in effect, and which enabled this enormous tonnage to move over these previous [fol. 487] years when the C. F. A. territory needed our coke. They were satisfactory to all of those lines, there was no complaint about them, and we think they should be satisfied at the present time for the purpose of our business,

since it is not a domestic proposition, or a by-product proposition, in competition with any of the other producers in that territory except that in so far as it may concern some specialty coke. But it is all a foundry or described as industrial coke, and should not be penalized, there is not enough of it moving to justify any penalty.

In justification of the rates I want to file Exhibit 28 which shows first, that there are some discrepancies in the rates that are published to Cleveland, for instance. The wrong mileage under the order was used perhaps, if the order might be applied to us, in that the rate was $4.35, and the actual distance, short distance, would produce a rate of $3.65 under Scale 2, and under Scale 3 would produce a rate of $4.00. Actual short distances as shown in this exhibit, there are discrepancies, and would produce different rates.

The ton mile earnings, as shown to the destinations in the affected territory to which coke actually moved, and which I have shown by my State number—or by a previous statement, shows the ton mile earnings, the present rate and the ton mile earnings, as compared with present rates, and the ton mile earnings to Southeastern and Carolina destinations, having comparable distances, and while this exhibit does not show the average of the ton mile earnings to the two destination territories, that is, North and South, a check of the addition and division of those will show the ton mile earnings, as I found out a few minutes ago, are exactly the same, barring a tenth of a fraction. In other words, they figure a whole fraction six and eight-one-hundredths mills for these long distances. We think our rates should be continued, and without detrimental effects to anybody else in the by-product coke business.

[fol. 488] Cross-examination.

By Mr. Donadio:

Our shipping points are shown on page 2 of Exhibit 28. We connect with the L. & N., N. & W., Southern Railway and with the Clinchfield & Ohio Railroad. The 13494 class scale applies between points on the Interstate Railroad. We have lower commodity rates than the normal Southern basis. Our commodities are incidental to the originating or producing of coal on our line, and our business is ninety-five to ninety-eight per cent. the production of coal and

coke. No other commodities move in volume locally on the Interstate Railroad except a car or two of lumber occasionally.

Cross-examination.

By Mr. Day:

I am not familiar with the consignee receiving the coke tonnage shown on my Exhibit 26. The falling off in the production of coke on the Interstate Railroad in recent years would be due to the same condition prevailing at all of the beehive coke producing points to the extent that the more modern up-to-date ovens have supplied coke at nearby destinations and origins—destinations closely located to the ovens have been able to take that business. It is generally conceded that the beehive oven, except for special industrial purposes, including foundry coke, may be at the [fol. 489] end of their row. There was coke tonnage delivered to other railroads beyond that shown in my Exhibit 26—to the Southern Railway, to southern destinations. We ship constantly beehive coke to southeastern destinations, about in the same proportion, to a greater extent maybe proportionately, considering it as a whole, than we have to C. F. A. territory, because the by-product oven hasn't run us out of the Carolinas like it has out of C. F. A. territory. That is because there are not many by-product ovens there; I don't know of any in the Carolinas; they are not there. Our tonnage there then, on that account, has been maintained at nearer the old level.

As to whether I regard it proper to carry the same rate for 448 miles to Frankford, as to Sparta, Michigan for a distance of 705 miles: It has been in effect ever since 1916, except for General Order 28, and Ex Parte 74, and reductions July 1, 1922. The rates have been satisfactory to those lines for that number of years. That is eighteen years those rates have been in effect. I know of no reason they should not be continued. In comparison, I have shown it would justify the continuance of those rates. Those I have shown are within the two scales averages. As to whether, if the $3.96 rate carried to points beyond Sparta, for greater distances, I would say for the same reason that it should be continued, regardless of distance, I would say it should.

The rates from Interstate Railroad points on coal are on the same basis as the nearby Norfolk & Western and L. & N.

producing points. There is no arbitrary for the haul on our road.

[fol. 490] Cross-examination.

By Mr. Norman:

I understand our rates to the North originally were established by making them the same as from Connellsville, that is one of the bases was originally arrived at by using the rate from Connellsville. As to what case that was done, as to the extent of it, I don't know.

The rates to the South I have shown here, as being on the same level as those to the North, are still in effect.

Cross-examination.

By Mr. Widell:

There has been no change in the general level of our rates since they were first established except, as I said, under those orders by which every other rate was changed by the Commission and the Government.

I am familiar with the order in the Stonega case, Docket 3771. That was in 1916, August 21, 1916, that was the first one of them.

Q. Is it a fact then, do you recall and know that your rates were made, from Appalachia or the Stonega District, to Chicago, were made the same as Connellsville, and increased 25 cents?

A. Under that order 3771 my understanding is in considering the rates from Stonega, the rate of $2.50 from Connellsville was also considered a proper basis for Stonega because of the fact the distances were practically the same. To that extent, the Stonega rates were made the same as the Connellsville rates to C. F. A. Territory.

Q. Previous to that, was your rate lower than Connellsville?

[fol. 491] A. Previous to that, I think we paid a ten cent differential added to the Louisville & Nashville rate, and what their rate was from Appalachia at that time, I don't recall, although I was in that case.

Mr. Orcutt: You are talking about rates on coal now?

Mr. Holton: No, coke rates.

Cross-examination.

By Mr. Day:

When the Ex Parte 74 advance was put into effect in 1920, the Wise County rates on coke to C. F. A. territory were only increased 33⅓ per cent. I don't know how much the Connellsville rates were increased at that time. The rates from our origins to the southeastern and Carolina destinations under Ex Parte 74 were advanced 25 per cent.

[fol. 492] Mr. Donadio: Before we proceed with further witnesses, Mr. Kern is expected to furnish certain statements, and it appears from the exhibits that have been introduced by other parties that the information which he was supposed to furnish is already in the record, and I now ask that Mr. Kern be relieved from furnishing that.

Examiner McGrath: Who furnished that information?

Mr. Donadio: Exhibits 9, 22, and 23 I think show the identical and precise information that Mr. Kern is supposed to furnish.

Mr. Holopeter: That was the suspended rates from Chattanooga and Wise County.

Mr. Norman: You are not asking that he be relieved from furnishing the statement as to where you depart from this scale are you?

Mr. Donadio: No sir.

Mr. Norman: Nor as to the list of the rates under suspension.

Mr. Donadio: The list of the rates under suspension from Chattanooga, and those other points of origin involved.

Mr. Norman: On the ground they are in the record now?

Mr. Donadio: They are all in the record.

Examiner McGrath: Is it your understanding that showing there is full and complete?

Mr. Donadio: It is representative, and probably as complete as any statement that we would present.

Examiner McGrath: At the moment, it occurs to the Examiner that perhaps those exhibits do supply that information, but if it should develop later it does not, I will have to still ask for the additional information.

Mr. Donadio: That will be perfectly agreeable.

[fol. 493] Examiner McGrath: Are you ready to proceed, gentlemen? Have the protesting respondents any further testimony?

Mr. Mohr: We have no further testimony at this time.

Examiner McGrath: We shall hear now from the protesting shippers then.

Mr. Widell: Yes sir, we are ready to proceed.

[fol. 494] C. E. WIDELL testified on behalf of protesting shippers as follows:

Direct examination:

I reside in Nashville, Tennessee. I am general traffic manager of the Tennessee Products Corporation, with main offices at Nashville. We own and operate by-product coke ovens at Chattanooga. I appear here in support of the southern carriers and as protestant against the suspended schedules.

The Chattanooga by-product ovens were originally established about 1915. The type of ovens was changed over in 1917 to the Semet-Solvay ovens, which is the present set-up. We operate two blast furnaces, one on coke at Rockdale, Tennessee, a local station on the L. & N. R. R. about sixty or sixty-five miles south of Nashville. The other blast furnace at Lyle, Tennessee, on the N. C. & St. L. Ry. is at present, and has for some years, been operated by charcoal as a fuel. It is the only charcoal pig iron furnace in the South. The blast furnace at Rockdale is not on foundry iron, or strictly speaking, on iron at all as such. It is and has been a ferror alloys manufacturing plant, principally ferro phosphorus, but coke is used in the reduction of phosphate rocks into the high phosphorus iron. It is used in the steel industry strictly, as an alloy. We own or operate no beehive ovens. We are the only by-product coke oven in the South outside of the Alabama District. We operate two mines; we own three; and at one of these mines we still have about 200 beehive ovens, which we have not been able to use on account of the quality of the coal. They are down and idle, and perhaps never will be used again. There is a production of beehive coke within a radius of a hundred miles of Chattanooga, at Coalmont, on the N. C. & St. L. Ry., adjacent to the coal mines at that point, from which there is a movement, not so much to the affected territory here, but to some outside points, mainly west of the Mississippi River.

[fol. 495] Examiner McGrath: Are there any rates from that point embraced in the suspended schedules?

Mr. Widell: No, few if any, but the fact of the existence of the beehive coke ovens in the South has a tendency of course to depress prices at important foundry points. Beehive coke is still used by foundries in the South, and it has its effect in that way, and generally throughout the entire rate structure. The by-products coke rates within Southern Territory followed largely the beehive coke rates, which I will refer to later, briefly.

I should like to say with respect to what was stated yesterday by the witness for the Chattanooga interests, Mr. Bissell, that the entire Southern Territory is largely agricultural, despite the great advance made in industry in the past twenty-five years, but the preponderance of population is in the country, agricultural. There is not the character of consumption of fuels, solid fuels especially, the same as we find in the North. This has restricted greatly, we have found, the consumption of domestic sizes.

The production of coke, as is perhaps well known, is principally in by-product coke ovens, and does not of course follow any special designation in the mere production of it. The time of carbonization of course will determine the structure, and whether it is to be used for foundry pur-
[fol. 496] poses, and so on. Foundry coke is the highest quality, and must be, prepared with the greatest of care. The battery of ovens such as we have at Chattanooga is not similar in many respects to even the Birmingham District ovens, and quite dissimilar from most ovens in the North, for the reason that we have no local furnace consumption. We own ourselves a blast furnace where we use coke from our Chattanooga ovens, although at times we have gone into Birmingham for coke, for that operation. The result has been that we have had to apply our production into whatever channels have been open to us. Generally, we try to get out, as it were, the greatest amount of foundry coke, and especially that which we sell, for the reason that the returns are greater on the foundry than on the other sizes.

We have found ourselves at Chattanooga with a preponderance of domestic sizes, because of the necessity of stocking it, at least during the past three or four years, for instance, as in the depression period. The stocking of coke

is practically a bar to any further use as foundry coke, of the highest grade. From there on, it practically goes into the furnace or industrial or domestic channels. The proximity of a number of foundry points to Chattanooga, such as Chattanooga itself, which, outside of Birmingham is the largest iron melting point in the South, together with such foundry points as Nashville, Atlanta, Knoxville and other adjacent towns, give us some outlet for our foundry sizes.

The general consumption, speaking in just broad terms, of coke of all kinds in the South, outside of furnace coke, will proximate I think around 350,000 tons. It will not run to that in the last two or three years, during the depression. The production of furnace, foundry and domestic sizes in the South, in the Alabama and Chattanooga districts, is substantially in excess of that. Birmingham has [fol. 497] found an outlet for a good deal of its foundry coke in northern markets, more so than we have at Chattanooga.

The fact of the cheap coal in the South in the past has been referred to by Mr. Bissell, and that is also augmented by the burning of wood, a good deal, specially in the country districts of the South. It is a fact that there is neither the wealth nor the population in the South, nor the general social nor economic conditions that will give us the background for the sale of coke in the South as compared with the populous districts of the North and East.

When the Chattanooga ovens were built, and for some time thereafter, there was a blast furnace at Chattanooga. It was intended of course that a part of the production at Chattanooga would supply the needs, or at least a part of the needs of the Chattanooga furnace. That furnace, however, was idle for many years, and that condition was largely responsible for the unprofitable operations of the Chattanooga ovens up until 1926, when the property was taken over by us. Since then the furnace at Chattanooga has been dismantled, and there is no consumption of furnace coke in that district. Whether there will be a revival of iron melting in the Chattanooga District is problematical, but if it does come, it will of course offer a better opportunity for the Chattanooga operations. There has been some talk of it of late, but nothing definite has developed.

I think that gives a fair general set-up of the Chattanooga operations, and the necessity we are under of finding outlets especially for what we term the domestic sizes.

As perhaps it was explained, Mr. Examiner, it is a question of screening, and the sizes of the coke, that determines [fol. 498] the name under which it comes on the market. Foundry coke is generally three inches and upward, carefully screened. Domestic sizes are of varying figures, 3 by 2, or mixed, 3 by 1, or 1 by 2, or smaller.

The prevailing prices in Southern areas I think were given yesterday, so I will not refer to that further.

I have distributed sets of exhibits, all of which are complete, except a number of them which do not include exhibits numbers 1 and 2, which are small government reports, issued by the Bureau of Mines, United States Department of Commerce, being statistical appendices to the Minerals Year Book of the Department of Commerce for 1932-33, in which I may refer, Mr. Examiner, briefly to some of the tables that I should perhaps like to point out.

Examiner McGrath: The first exhibit number is 29.

Mr. Widell: That is a printed pamphlet that I have just described. No. 30 is a mimeographed pamphlet of 8 sheets.

Examiner McGrath: Suppose you identify these exhibits off the record.

(The exhibits were numbered and identified off the record.)

Mr. Widell: There is a publication known as the Penton's Foundry List, familiar to everyone I am sure in the coke industry. It is an authority on the foundries of the country, in other words, their location, and the statistics with respect to foundry consumption of coke. I should like, Mr. Examiner, the privilege within say 10 days if you will grant it, to draw up a statement showing the number of foundries in southern states, compared with Illinois, Indiana, Ohio and Michigan, taken from Penton's Foundry List. The latest issue I have is 1931, but it is representative I think of the present time, as well.

[fol. 499] Examiner McGrath: Is there any objection to that statement being filed?

Mr. Day: Will you show the tonnage produced by those foundries?

Mr. Widell: That is not given, it is just the location of the foundries, cities, states, and so on, and the number of the foundries, in each city. It is merely for informative purposes for the record.

Mr. Day: We have no objection particularly to receiving such a statement, but it seems to me it won't be very helpful unless the statement of the number of plants is accompanied by a showing of the amount of coke used.

Mr. Lewis: It shows the number of cupolas.

Mr. Widell: Yes indeed, it will show the number of cupolas in connection with the foundry.

Examiner McGrath: What will that indicate?

Mr. Widell: That will indicate I think the channels or outlets for foundry coke in the two respective territories that are here under discussion, to support our statement that we need these outside markets.

Examiner McGrath: Is there any objection to that statement being supplied? (No objection—stated by several.)

Mr. Day: We have no objection.

Examiner McGrath: Very well. You are hereby authorized to furnish that statement within 10 days. Will that be sufficient?

Mr. Widell: I think so. You might make it 15 days to make sure that I get it in the mail.

[fol. 500] Examiner McGrath: Fifteen days, and I will ask you to furnish the respondents and other parties to the hearing with copies of it, at the same time you furnish them to the Commission.

Mr. Widell: Yes sir, I shall be glad to do that, Mr. Examiner.

Examiner McGrath: And refer in your letter of transmittal to the page of the transcript of the testimony in which this permission is given.

Mr. Widell: Yes sir. I think it is understood that the main purpose of introducing exhibits Nos. 29 and 30 is to supply what seemingly heretofore has been lacking in the exhibits furnished for the record, in other words, the general information in the coke industry. I have no special purpose with any of these tables, and so on, but I may say that what I had in mind was, take Table 1——

Examiner McGrath: Speaking now of Exhibit 29 as to that, are you?

Mr. Widell: Speaking of Exhibit 29, table 1, which contains general statistical summary. Table 2, which compares the trends of the industry from 1923 and 1929 to 1932. Table No. 3,—or shall I just name the tables?

Examiner McGrath: The tables will be sufficient.

Mr. Widell: Tables 3, 4, 7, 11, 14, 17, 19, 21, 23, 28, 30, 34, and 36.

I should like to call attention perhaps to Table 28 on page 271 of this exhibit, which discloses the amount of coke produced by states, all kinds of coke, which is then segregated with the furnace coke used by producer, and so forth, eliminated, or taken out, and the balance shown as furnace, [fol. 501] foundry, and domestic, together with industrial, and the tables. This shows the information by states. I may say that the Alabama figures are representative of the Alabama operators interested in this proceeding; that the Tennessee figures are exclusively our own.

Table No. 14, on page 261, gives the capacity per day, net tons of coke, of the various plants, by states, for the year 1932, which is I think fairly representative of the year 1934. Whatever is lacking in Exhibit No. 29 with respect to comparison with present conditions two years later show why,—or we find in my Exhibit No. 30, which is of course a greatly restricted publication, and merely gives the preliminary figures, preparatory to the printing of the regular yearly book.

Mr. Keeler: You state that 14 shows the capacity of the ovens in the various states?

Table No. 14, on page 261 of Exhibit 29, gives your capacity per day by states. For instance, you will get Alabama, the first figure, 13,995 net tons of coke per day. Chattanooga ovens are opposite the Tennessee figures, and show 375 per day. The next, and the last column, gives you the number of ovens in existence at the end of the calendar year, 1932. I think those figures are self-explanatory.

[fol. 502] Mr. Widell: I might say, Mr. Examiner, if counsel will remember, this is a per day capacity, that is why the figures may seem small, compared with what we usually figure the annual capacity. These are the net tons of coke per day, and represent the total capacity, in state order. As I said, my Exhibit No. 30 is merely the 1933 figures, and sheet No. 5, particularly in that exhibit corresponds to Table 28 of Exhibit No. 29.

My exhibit No. 31 shows figures taken from the I. C. C. statements, reference to which is indicated on the bottom of the exhibit, for the years 1929 to 1932, inclusive, plus the first quarter of 1934, which are the latest figures avail-

able. The figures for the Southern District, particularly the Southern region, show of course uniformly as indicated on the exhibit what I have shown as excess production. In other words, the statistics indicate no—what I have shown as excess consumption in the Southern region for any of the years indicated. Now under the Eastern District there, I have shown of course the entire figures in these statements for the whole United States, so that while we are not interested in New England, nor perhaps in much of the Central Eastern Region, I merely show all of the figures.

It will be noted of course that in what is shown on the exhibit under the Great Lakes Region, that there is a preponderance of what I have shown as excess consumption. It is true of course as we know that these origins are strictly speaking not geographical, in the sense that only portions of the territory are designated as such, because of facts which are known to all of us, but I have shown on the exhibit the principal carriers in C. F. A. and their designation as [fol. 503] Great Lakes, the Central Eastern region, and I think it is so familiar to all of us that unless someone would like that more specific, Mr. Examiner, I would like to leave it as it is.

Examiner McGrath: What territory do you understand the Great Lakes region includes?

Mr. Widell: It includes generally the carriers in the affected territory in C. F. A. Territory, in what the Great Lakes region would signify. But some C. F. A. lines are reported or show reports under Central Eastern region. I don't recall off hand whether the Pennsylvania Railroad, and New York Central Railroad,—what the designation is, but some of the C. F. A. lines are thrown into the Central Eastern region for statistical purposes, because of the difficulty of segregating their statistics at the frontier points.

Mr. Day: As a matter of fact, neither the Central Eastern nor the Great Lakes region can be said to be co-terminus with the borders of Central Freight Association Territory; I mean with the borders of the affected territory here.

Mr. Widell: That is correct.

Mr. Day: In other words, the Central Eastern Territory and Great Lakes Territory, or Great Lakes region, take in all of the territory north of the Ohio River.

Mr. Widell: That is correct, in the statistical reports.

Mr. Day: And the Great Lakes district showed roads like the Delaware, Hudson, Lackawanna, and Lehigh Valley, that have no connection with this territory.

Mr. Widell: Oh, that is the reason I made this clear. It might be helpful, Mr. Examiner, if you should care for it, in connection with Exhibit No. 31, that I should file a sup-
[fol. 504] plemental exhibit to this, merely outlining the principal carriers and their designation as Great Lakes region, or Central Eastern region.

Examiner McGrath: Taken from these sources?

Mr. Widell: Not from these statements, but rather from the annual statements, the entire annual statements of the Commission.

Examiner McGrath: Is there any objection to that statement being filed?

Mr. Day: I have no objection.

Mr. Holopeter: It seems to me that will only show what is shown here, because many of those individual carriers extend beyond the C. F. A. Territory, and beyond the affected area here.

Mr. Widell: Yes, it was merely supplementary.

Examiner McGrath: Do you wish to file such a supplementary exhibit?

Mr. Widell: I would be glad to if that would be helpful at all.

Examiner McGrath: Permission is hereby granted to file a supplemental exhibit. You can designate that Exhibit No. 31-A, and furnish the opposing side with copies?

Mr. Widell: Yes sir.

Examiner McGrath: And refer to the page of the transcript on which the permission appears.

Mr. Widell: Yes sir. Let me correct my former statement, Mr. Examiner, with reference to the I. C. C. statements shown as authority on my Exhibit No. 31. These statements do show the carriers that are designated Great Lakes region or Central Eastern region, because these statements are the annual commodity statistics reports.

[fol. 505] Exhibit No. 3 is taken directly from Supplement No. 8 to Agent F. L. Spieden's I. C. C. 1770. These points shown on the exhibit include every point named in the supplement I have just referred to, so far as my recollection serves me.

I wish to file, or ask permission to file and offer here the supplement itself, as an exhibit supplementary to my Exhibit No. 32, which I should like to mark or have numbered Exhibit No. 32-A, for the record.

Mr. Mohr: That being the suspended tariff, supplement to the Chattanooga coke tariff?

Mr. Widell: That is right. The reason for that is that this supplement contains, along with the stations that are shown in my Exhibit No. 32, all of the stations opposite which the character marked "C" is shown, indicating cancellation rates and routes canceled account of no movement. Reference has been made to that by these other witnesses. Rates to these points were canceled under a misapprehension, that was erroneously assumed by the committee in Atlanta that had charge of the compilation of these rates, and the printing of the tariffs.

Examiner McGrath: I take it you haven't sufficient copies to supply parties with copies?

Mr. Widell: No sir.

Examiner McGrath: Will the parties want one?

Mr. Mohr: The carriers do not, the Southern carriers do not.

Mr. Widell: And I am sure, Mr. Examiner, that all of the parties interested here are supplied with that supplement. They are on the mailing list.

Examiner McGrath: You want to designate that, and file it, as Exhibit 32-A?

Mr. Widell: Yes.

[fol. 506] Mr. Day: Who issues that supplement, Mr. Widell?

Mr. Widell: The tariff publishing agent, Mr. Speiden.

Mr. Day: We would have to get it from the Southern lines, then.

Mr. Widell: Oh, you have it in your tariff files.

Mr. Mohr: Well, we will furnish it.

Mr. Widell: I should like to call attention to the averages, which are of course general averages, on both sheets No. 1 and No. 2, of Exhibit 32. I have shown on my exhibit the destinations in state order, which is somewhat different from the tariff order, which is alphabetical. On my exhibit I show the percentage relationship of the suspended rates to the C. F. A. scale, and the present rates. To destinations in Michigan, the suspended rates are 110 per cent of the present

rates, which are exactly the same as the C. F. A. scale, that is the general average. The exhibit is self-explanatory along that line with respect to Ohio, Indiana, and Illinois destinations. The total general averages are shown on the bottom of Sheet No. 2, with the result indicated. I think that this demonstrates the proximation of the C. F. A. scale prescribed in I. & S. 3511 with the present rates from Chattanooga, the history of which I shall give briefly as we go along.

Mr. Donadio: May I interrupt you for the purpose of clarifying something?

Mr. Widell: Yes sir, surely.

Mr. Donadio: Those percentages shown at the bottom of each rate column, what does that mean? For instance, you show under "Present," 100 per cent.

[fol. 507] Mr. Widell: I used the present rates as 100 per cent for a basis so as to provide a ratio for comparison.

Mr. Donadio: Does that mean that the suspended rates are 110 per cent of the present rates?

Mr. Widell: That column of rates is 110 per cent, general average, of the present rates.

Mr. Mohr: To Michigan.

Mr. Widell: Yes, to Michigan.

Mr. Donadio: It is likewise 110 per cent of the C. F. A. scale?

Mr. Widell: No, the C. F. A. scale is the same average as the present rates.

Mr. Donadio: I see. Thank you.

Mr. Widell: But of course it would be mathematically,—by mathematical computation it would fall back on the other column as you suggest, but in the other columns you do not get that same operation, you understand.

My Exhibit No. 33 is a history of the rates generally from Chattanooga to C. F. A. Territory, including of course I. F. A. points affected, either directly or by a change in routes. These of course are not all of the destinations in C. F. A. or I. F. A. Territories to which rates apply at the present time. They show all of the points to which specific rates were published from Chattanooga up to January 1, 1923, and I shall explain why I stopped there, and added merely the present column.

In the first column of this exhibit No. 33, correct, please, 1926 to read 1916. In other words, the first rates published from Chattanooga to points north of the Ohio River were to Chicago, and Evanston, Illinois. These rates were made the

same as the then existing rates from Appalachia, Virginia, or Southwest Virginia beehive coke oven points, regarding [fol. 508] which some testimony has already been offered.

In April 1916, additional rates were provided to points in C. F. A. Territory, as shown in my second column. No changes were made in the situation as to Chicago or Evanston.

On February 10, 1917, a change was made not only from Chattanooga, but also from Appalachia, the Southwest Virginia beehive coke ovens, in compliance with the Commission's order in the so-called Stonega case, reported at 39 I. C. C. 523. The $2.50 rate shown to Chicago was the then existing rate from Connellsville, Pennsylvania, to Chicago. All of the rates, I understand from the competing beehive ovens in the New River District, and Appalachia, and so on, were changed, or at least made no less than $2.50. My own research, in so far as I have been able to determine, indicates that the Appalachia, Virginia, rates to Chicago were made the same as the C. & O. New River ovens. Some reference was made to that this morning, and I thought I would clarify that, or attempt to clear that point up here.

The next column, headed June 15, 1917, shows rates in response to the increase of 15 cents per ton, authorized in ex parte 57. And the other columns I think are fairly self-explanatory, except that I might merely supply the fact that the June 25, 1918 column shows the rates under General Order No. 28, and the August 26, 1920 rates are responsive to the Commission's decision in Ex parte No. 74, and the July 1, 1922 rates are the result of the 10 per cent reduction.

It was referred to this morning that the rates from Southwest Virginia to C. F. A. Territory were not changed effective August 26, 1920, in line with the basis in C. F. A. Territory, or to the 40 per cent increase. That is true. Neither were the rates from Chattanooga.

The rates in the second column, headed "April 26, 1916" from Chattanooga to the C. F. A. destinations indicated, are actually the then existing Connellsville rates to those destinations.

[fol. 509] As a result of the various increases effective August 26, 1920, the rates from the southern beehive and by-product ovens to C. F. A. territory became less than from Connellsville or the New River District. This continued on until January 1, 1923, at least so far as Chat-

tanooga is concerned. Effective as of that date, all rates from Chattanooga to C. F. A. and I. F. A. territories were changed to reflect the full 40 per cent increase allowed the carriers in Official territory. In other words, we were put back exactly on the Connellsville basis, with this exception, that to points north, generally north of Bay City, Michigan, and generally north of Chicago, and Chicago outlying districts, C. F. A. lines required rates from Chattanooga on a higher basis than from Connellsville, and the differential discussed previous to that time, and especially previous to July 1, 1922, had been 60 cents. On July 1, 1922, the 10 per cent reduction would have brought that to 54 cents if that differential had been applying at that time.

As a result of our desires to reach more C. F. A. points, and especially southern Michigan points, where we were told, or the old company was told that there was a demand for domestic coke, especially, we agreed to the entire change on the 40 per cent basis, same as from Connellsville, and also of course had to accept the rates to points north of Bay City on the 54 cent differential over Connellsville.

Now that affected our rate to Milwaukee, and affected our rate points generally in the upper tier of the southern peninsula of Michigan, all within central territory, and gener-
[fol. 510] ally within the affected area that we have here under discussion today. Generally, that is the basis today. I think it was in 1924 if I am not mistaken that we had a wider range of destination points opened up to us, but generally on the rates that are shown in next to the last column, which were applied as maxima to intermediate points.

Now these rates were made of course subject to Rule 77 generally, via direct lines and in order to take care of shipments to points not shown, it was deemed best to establish rates to additional points, without the necessity of having to go through reparation claims on Rule 77. Later, a definite intermediate rule was introduced into the tariff, a couple of years ago, and under that intermediate rule, the next more distant point on direct routes became the legal rate, the tariff rate to an unnamed intermediate point.

So that all these years, beginning in 1916, up to the present time, or at least until the suspended schedules were published, we have maintained the general basis unchanged, followed definitely the so-called Connellsville basis. I may say that of course these rates have been maintained all

these years with the concurrence of the C. F. A. carriers, up to the time that they revoked the concurrences.

[fol. 511] My next Exhibit, No. 34, is a re-rating of coke shipments from Chattanooga to northern destinations during a period from January 1, 1933, to March 31, 1934. It may not be material, perhaps, but I might explain why we did not use the calendar year. It was intended to begin with, and I so instructed, to have the 1933 figures shown. The year 1933, however, was a very lean year, that is, so far as northern shipments were concerned, due to the mile climate generally, and economic conditions, and the depressed prices in the North. The exhibits were then drawn up with the first quarter of 1934 included in the 1933 figures, and when they were brought to my attention, I just let them go on — the printer as they were.

Now I think I can segregate the 1933 figures from 1934 if the northern carriers desire it, but not today, by different destinations, but I can give you the total tonnage. Otherwise, I think the figures shown are representative, at least for a 15 months period instead of 12 months.

Sheet No. 2 indicates that on a weighted average basis that the C. F. A. scale prescribed in I. & S. Docket 3511 would *be* increased the weighted average from 376 cents to 401 cents, or 7 per cent.

Mr. Mohr: Did you say that was *su*ing the Column 2 scale?

Mr. Widell: I am using the Column 2, C. F. A. scale. If we should have had the benefit of that, we would have arrived at these figures. In other words, it would have cost our customers more money, and to the extent of the testimony of Mr. Bissel would, as we view it and as found by our experience, have set up that much additional sales resistance.

[fol. 512] My next exhibit, No. 35, a rerating of shipments to the southern destinations, and I found that the same period was used and so I let it go in that way. I have shown both exhibits 34 and 35 by state order.

Mr. Mohr: There again, have you re-rated the tonnage on the basis of the C. F. A. scale, that is the Column 2 scale?

Mr. Widell: Column 2 scale, that is shown on Sheet No. 3, of Exhibit 35, which indicates that the C. F. A. scale on a weighted average basis is 16 per cent higher than the going level of rates in Southern territory.

Mr. Mohr: Using the destinations to which these shipments were made?

Mr. Widell: Using actual shipments, showing tonnage and so on.

Mr. Day: How do you arrive at that 16 per cent, by comparing freight charges?

Mr. Widell: Take there your freight charges, you see, it is a weighted average, take the weighted average rates, and if 224 is your weighted average rate, as shown on the bottom of Sheet 3 exhibit 35, and that represents 100 per cent, why your C. F. A. scale weighted average of 261 cents would of course produce 116 per cent. It is a mathematical computation, I think, if you just compute it on your freight charges.

Mr. Day: It does make a difference, because where the C. F. A. scale was lower than the southern rates, and there was a substantial movement under such a rate, then it would affect the showing on the percentage in the freight charges.

Mr. Widell: No, that is reflected in these figures, isn't it?

Mr. Ribe: That is right.

[fol. 513] Examiner McGrath: Proceed, please, gentlemen, into the testimony, direct examination.

Mr. Day: It is not cross examination. I am just trying to get clear what the witness is saying.

Mr. Widell: In my exhibit No. 36, I have supplied what appears, or perhaps what does not yet appear in the record, and that is the actual averages as it were of local rates out of Chattanooga; in other words, we have already shown what the weighted average was on the actual movement, and so on, and are now testing that as against what the carriers in the South actually publish from Chattanooga to local stations within a radius of the distances shown on the exhibit.

On Sheet No. 3, it will be found that the general average, the total general average for these three carriers, of the present rates, is 166 cents. The C. F. A. scale, or the Column 2 scale, in Appendix 8 of Docket 3511 is 169 cents. The averages are shown also for each carrier. A map I think would have perhaps shown definitely the fan-like radiation from Chattanooga of these three lines, the N. C. & St. L. north and northwest, the Southern Railway northeast to east, and the Alabama Great Southern, south to southwest.

My Exhibit No. 37 is directed to the proposition,—if I may make this preliminary statement, Mr. Examiner, is directed to the proposition that the transportation burden

is differently distributed in the South from that in the North. We have high class rates, generally, high levels on manufactured goods or so-called high grade goods. It is commonly known and recognized that there must be an actual,—there must be and actually is in the South a resulting [fol. 514] lower level of low grade commodities. And when I say that the defendants, or respondents here today are on record, as it were, openly before the Commission and before shippers that on low grade commodities there is not the objection to observing the destination levels in reaching the northern markets that there is on the high grade or class rate traffic, I merely repeat something that is generally known.

Now in my exhibit No. 37, I have shown the rates, originally established effective July 1, 1915 from Chattanooga, not to all points, but to representative points in Southern territory, showing the relationship with rates on coal and coke, beehive coke from the Birmingham District, and from coal mining groups in the vicinity of Chattanooga.

Mr. Examiner, a map would undoubtedly have been helpful at this point, as well as other points, for the reason that from the earliest beginnings of coke production in the South, which of course was in the nature of beehive coke, the rates on coke have been made the same as on coal. In fact, the carriers 30 years ago or more observed steam coal rates on coke, where the steam coal rates were lower than the rates on lump or block coal. That relationship has never been changed for over 30 years, 40 years, or probably longer, from the very beginning of beehive coke ovens in the South. Our rates today still reflect the coal rate adjustment in Southern Territory.

I shall not attempt to give station by station the exact basis that was applied in establishing rates on coke, by-product coke, from Chattanooga. Reference to the exhibit will indicate however that the then existing rates from Birmingham show of course a decided influence on the subsequently established rates from Chattanooga. The last [fol. 515] column is headed "N. C. & St. L. Whiteside Group." That is a group of coal mines on the N. C. & St. L. 14 miles west of Chattanooga. It is the original basing group of mines, both for coal rates and coke rates in Southern territory.

The first coal that ever reached Atlanta, Georgia by rail moved from Whiteside, Tennessee. The Birmingham coal rates today are the old Whiteside basing group rates. In other words, we have in the vicinity of Chattanooga on the west, the Whiteside group, and this goes back to the coke rate adjustment, the Whiteside group on the N. C. & St. L. Railway 14 miles west, the Rathburne group north about 20 or 22 miles on the Cincinnati, New Orleans, Texas & Pacific, and the Durham group on the Central of Georgia, 30 miles south, so that Chattanooga has been encircled with beehive coke ovens from the earliest beginning.

The Birmingham coal and coke rates in 1883 were bodily taken as it were from the then existing Whiteside group, with which was and has been related for these years, the coal and coke rates in Southern Territory up to the present time. And it is still maintained in the revision required by the Commission in the Southern coal rate revision which is now pending on order of the Commission in I. & S. Docket 3778.

What has been stated as the intention of southern carriers to revise our coke rates in the South is of course dependent on the revision of coal rates in I. & S. 3778. Out of that coal rate revision has come no drastic change in coal rates in the South. We shall preserve generally our existing level and [fol. 516] as we have had it testified to here, there is, as far as I know, no movement on foot to revise coke rates in Southern Territory either upward or downward.

I may say that of my own knowledge, when I was approached as to whether southern industry as a whole, ourselves and others, because I represent consumers too, we are consumers ourselves, if we could stand generally the C. F. A. level in the South throughout except—in other words, the Northern level for the South, my own unhesitating opinion was no, and I base that on my experience at our own plants, and industry in the South as I know it.

Mr. Orcutt: I have no objection to all of this, but I would like to know what it has got to do with this case. I am sure that I can't see any connection, as I understand the issues.

Mr. Norman: The Commission said in 3511——

Examiner McGrath: Mr. Norman, I think that is for the witness to say. What specifically is the purpose of going into the level of the rates in the South?

Mr. Widell: For the reason, Mr. Examiner, that our position must certainly be clearly stated. And generally speaking, my own position is that in I. & S. 3511, the Commission erred as to fact, and as to law, which will be argued on brief.

Mr. Orcutt: This is not a rehearing of that docket. They refused to reopen it for a rehearing. If you are attempting to rehear that and reopen and retry that case, of course we object to your evidence and your testimony, because it is not proper here.

Mr. Norman: In that case they didn't prescribe any rates, except maximum rates.

[fol. 517] Examiner McGrath: Well, haven't you covered that matter sufficiently now, Mr. Widell?

Mr. Widell: Oh yes, indeed.

Examiner McGrath: The relation between the coal and coke rates.

Mr. Widell: Indeed, yes. I just offer Exhibit No. 38 as a supplementary exhibit showing the evolution of the coke rates in Southern Territory. Now I may say further in support of these two exhibits, that regardless of whether the Southern coke rates have been approved by the Commission or not, they represent an adjustment that goes back to antiquity of railroading in the South. That is the level. This record shows there is to be no attempt to increase it.

Examiner McGrath: Don't indulge in argument.

Mr. Widell: I was leading up to this part of the statement, that if our general level in the South can be shown by proper evidence to be as low or lower than within the North, then an overhead level from the South to the North certainly should be no higher than to reflect the two levels. That is our main position, and in support of that position, I have offered these facts.

Mr. Orcutt: That is based on the theory, is it not, also that the Commission erred in increasing the interterritorial rates 33⅓ per cent?

Mr. Widell: No, outside of that entirely, an independent proposition.

My exhibit No. 39 is a comparison of the present rates on coke from Chattanooga, shown in the right hand column, together with the Column 2 C. F. A. scale on coke, with the [fol. 518] rates on coal from the so-called outer crescent group of mines to certain C. F. A. points on the carriers

indicated in the exhibit. The exhibit is self-explanatory. I used these mines, the Group 2 mines, on the Cincinnati, New Orleans & Texas Pacific Railway for the reason that those mines come down almost to within the back door of Chattanooga, 15 or 20 miles north of Chattanooga.

This group of mines takes the same rates as the outer crescent group of mines, more fully described in the citation in the heading of the exhibit. The distances are explained in the exhibit, together with short line, and all route averages from the outer crescent mines, as indicated on the bottom of sheet No. 2 of the exhibit.

My next exhibit is No. 40, which is a brief reference to a number of commodities from the South to the North, comparing rates and earnings with the rates and earnings on coke from Chattanooga. Two of these commodities compared with coke are our own commodities, my own. In other words, we produce wood charcoal at Lyle, Tennessee. We are one of the largest of wood charcoal producers in this country. We operate a large hardwood distillation plant at that point. I have only shown one rate from Lyle to Detroit, for comparable distances, and this is representative of actual movement to Detroit. It not only is representative of movements to Detroit from Lyle and other Southern producing points of charcoal, but it is a bird's eye view of the entire adjustment on charcoal from the South to the North. And I may say this, that the level of charcoal rates shown here are the subject of either complaints already filed or about to be filed, as being excessive, compared with rates on charcoal in Official Territory. But regardless of that, the exhibit indicates the revenues accruing on these compared commodities.

[fol. 519] Take mineral wool from Rockdale, Tennessee, to Detroit, Michigan. That is representative of the entire movement of mineral wool, which is a rock or slag wool, and is an insulating material, representative of the entire movement from Rockdale to Official Territory from the Atlantic Ocean, clear over to the Mississippi River. In other words, it is representative of the general basis. I should like to say further with respect to mineral wool rates, they are on 27½ per cent of our going first class rates from Rockdale to Official Territory. That basis was established to meet, or to match the 5th Class level in Official Territory, which is 35 per cent of first class. The way our first-class rates are

adjusted, on the Q-1 basis, the 27½ per cent from Rockdale to Official Territory is approximately the same, mile for mile, as 35 per cent of first class within Official Territory. It is not incidental, it didn't just happen that way, the rates were made that way, because of course during that time, I had the making of them myself.

Now the other two commodities, I do not manufacture, I do not move them, but I am familiar with them.

Mr. Cronk: You mean they are Commission-made rates, don't you?

Mr. Widell: I beg your pardon.

Mr. Cronk: You said you had the making of them yourself, I understood you to say.

Mr. Widell: No, they are voluntarily established by the respondents, C. F. A. respondents here.

The other two commodities, now, stoves, and furniture, were not manufactured at any of our plants, but I am to a certain extent familiar with the production of stoves and furniture, generally, at least in Southern territory.

[fol. 520] I may add for a period of about 9 years, I was in charge of the Traffic Department of the Tennessee Manufacturers Association, an association including among its membership stove manufacturers and furniture manufacturers in the South, in Tennessee. The rates on stoves and furniture are shown on the exhibit, and are the rates prescribed by the Commission, with the citations listed on the exhibit itself. The furniture rates actually do not reflect the present rates, which in many instances are lower, due to truck, motor truck competition, but if the carriers were to get all that the Commission gave them in the furniture case, a carload to Detroit from Chattanooga would net them the figure shown on the exhibit, as compared with the earnings on coke shown.

My last exhibit, No. 41, is mainly directed to a comparison of freight costs of coke produced at Chattanooga with similar costs at producing points in the C. F. A. Territory. I have added a column at Detroit, and a column at Chicago for total costs, to those two, that is the last column and the third from the last column. Those total costs include the first column which is headed costs, f. o. b. mine, in cents. I might say in explanation of that column that I have just referred to, in other words, the f. o. b. mine costs of coal,

that for the first time in my knowledge, by-product coking coal is sold to all coke producers for exactly the same price. It is the Southern Appalachian high volatile and low volatile basis, $1.90 a ton.

With that in mind, I think then that the comparison of my costs, f. o. b. mine costs, together with my freight charges, reflect a fairly accurate condition at Chattanooga, compared with the by-product coke plants shown on the ex-
[fol. 521] hibit. The exhibit is not all comprehensive. I took two important points. I think the commercial witness, Mr. Bissell, stressed that Detroit and Chicago were very important points, consuming points, so far as the Chattanooga ovens are concerned.

Examiner McGrath: Does that complete your direct testimony, Mr. Widell?

Mr. Widell: That completes my direct testimony, and I now offer my Exhibits Nos. 29 to 41, inclusive.

Examiner McGrath: Exhibits 29 to 41 inclusive are received in evidence.

(And thereupon said exhibits 29 to 41 inclusive of Witness Widell were received in evidence.)

[fol. 522] JOSEPH G. KERR, testified on behalf of the Louisville & Nashville Railroad as follows:

Direct examination.

By Mr. Mohr:

I am assistant to the traffic vice president of the Louisville & Nashville Railroad Company and am familiar with the so-called Divisions Case, involving the divisions, interterritorially between the South and the North, I. C. C. Docket No. 24160. I am chairman of the traffic defense committee of the southern carriers appointed by the Traffic Officers of the Southern Lines and am familiar with the issues in that case.

The divisions of coke rates between the South and the North are not involved in that case, although it is true that the Commission has not as yet amended its order instituting the general investigation in I. C. C. Docket 24160, so as to formally exclude coal and coke. The petition to the Com-

mission, asking that it institute a general investigation into the interterritorial rates was first filed by the Official territory lines, and covered class rate traffic, and certain commodities specifically related to the class rates prescribed by the Commission in Docket 13494. That petition did not embrace coal and coke. The southern carriers filed a petition asking that the Commission include all kinds of traffic, moving interterritorially between the southern and the eastern groups. It was not intended, however, by the southern carriers to include coal and coke. In making the [fol. 523] opening statement on behalf of the Southern carriers at the hearing in Washington, D. C., in June 1933, I made this statement, at page 2770 of the record:

"While the general investigation includes all traffic moving inter-territorially between Official and Southern territory roads, we have excluded from consideration coal and coke on the theory that there is no general dispute regarding the divisions of rates on these commodities, and so far as we are concerned, they may well be excluded from consideration. In any event, we haven't in any of our divisional studies or proposals taken into consideration the divisions of rates on coal and coke."

At the next hearing, which was held on February 14, 1934, in Washington, Mr. L. E. Oliphant, chairman of the defense committee of Official Territory lines made this statement at page 5141 of the record:

"Mr. Kerr at page 2770 stated that Southern lines had excluded from consideration in these proceedings coal and coke. On behalf of the Northern lines, I will state there will be no objections by Northern lines to the elimination of coal and coke in carloads from consideration in these proceedings."

And that is the way the record stands today, the hearings not yet having been closed.

[fol. 524] Cross-examination.

By Mr. Day:

Q. Isn't it a fact that at several places in the record in 24160, you make reference or mention of coke rates from the South to the North?

A. Is your question limited to coke?

Q. Yes.

A. I do not now recall having mentioned coke rates from the South, but I did discuss coal rates and divisions.

Q. Isn't it a fact that in your testimony in Docket 24160 you referred to the answer filed by Roy S. Kern, chairman of the Coal, Coke & Iron Ore Committee of the Central Freight Association, respecting the suspension of coke rates from the South to the North, that is under investigation here?

A. Yes sir, I referred to that statement at the last hearing, which was held in June or July. And may I state why I referred to it?

Q. Yes.

A. The position of the Northern lines, of the Official Territory lines in Docket 24160 as stated over and over and over again was that the transportation conditions in Southern Territory were just as favorable as the transportation conditions in Official Territory; therefore a mile in Official Territory was just as good as a mile in Southern Territory, in dividing these inter-territorial rates, and I was showing by Mr. Kern's statement made on behalf of the Central Territory lines, and by the evidence of Mr. Oliphant himself given in another proceeding a few years ago, that that statement was directly contrary to the position the C. F. A. Lines were taking in another, or in other proceedings.

[fol. 525] Mr. Day: Did you not state, at page 2483 of the record in Docket 24160 and reiterate your statement at pages 6667 or 6666 of the record in that case, that the "Interstate Commerce Commission has many times found that the Southern Region lines are entitled to, and should have, a somewhat higher basis of freight rates than prevail in the Eastern District. This is so generally conceded that no argument in connection therewith is worth while; however, it may be said that the principal reason for the necessity of a higher level of freight rates in the South than in the North and East is due to the much lower traffic density in the South than found in the North and East. It is also due to some extent to a different distribution of the traffic burden or the sources from which the carriers' revenues are derived."

A. You are not quoting from my testimony given in I. C. C. Docket 24160. The quotation you have made is from my

testimony in the Export and Import case, decided several years ago by the Commission; the evidence which you quote was given in 1927.

Q. But you reiterated it in the Divisions Case, 24160, did you not?

A. It was filed as an exhibit in that case, because your witness had extracted lines here and there, then skipping a few lines, copying a short paragraph, then skipping another paragraph, so I asked that the entire evidence be filed as an exhibit, and that was done.

Q. Isn't this the way it was done, that your counsel asked you this question: "Mr. Oliphant has quoted from your testimony in F. S. A. 2040, et al., and at your request there has been made a part of this record, as Exhibit No. 1485, your complete testimony given on April 25, 1928. Do you care to say anything regarding this testimony," and you answered: "Yes. I do not retract one word of what I there said and even the most casual study of that testimony will [fol. 526] indicate that it is substantially the same as I have given in this proceeding, although in a much more restricted form."

A. You are correct.

Q. It must be remembered that this was a fourth section proceeding and the endeavor was to show that the rates we were proposing were "reasonably compensatory" within the meaning laid down by the Commission in fourth section cases, and I was using average costs with certain qualifications in an effort to show that from the standpoint of "added traffic" that our rates met that test. The Commission, however, did not agree with me. It will further be noted that I then said at page 2483, but which Mr. Oliphant did not quote:

"The Interstate Commerce Commission has many times found that the Wouthern Region lines are entitled to, and should have, a somewhat higher basis of freight rates than prevail in the Eastern District. This is so generally conceded that no argument in connection therewith is worth while; however, it may be said that the principal reason for the necessity of a higher level of freight rates in the South than in the North and East is due to the much lower traffic density in the South than found in the North and East. It is also due to some extent to a different distribu-

tion of the traffic burden or the sources from which the carriers' revenues are derived."

and, after discussing various comparisons, I said at pages 2493-2494:

"An increased volume of tonnage will necessarily increase gross revenues, but an increased volume of tonnage does not necessarily increase unit cost of operation, or, in fact, materially increase the total cost of operation, of a plant not operating to its capacity."

A. I made that statement, and I adhere to all of them.

Examiner McGrath: Have you any further questions?

Mr. Day: Yes, I have one more question.

[fol. 527] Q. Did you not, in the Divisions case, Mr. Kerr, call attention to the very onerous operating conditions on the Louisville & Nashville Railroad between Cincinnati and Nashville?

Mr. Mohr: I object to the question. I don't see that it has any relevancy at all.

Mr. Kerr: If counsel will permit, I would like to answer that question.

Q. Did you give testimony to that effect?

A. I gave testimony indicating the actual conditions prevailing on that particular line between Louisville and Cincinnati, because your witness, Mr. Oliphant had undertaken to visualize certain services north of the River with certain services south of the Ohio River, and he had undertaken to refer to that line as one operating right alongside of the Ohio River, between Louisville and Cincinnati, and I gave that testimony, and so stated, for the purpose of indicating that Mr. Oliphant did not know anything more about conditions in Southern Territory generally concerning which he had testified, than he knew about these lines of the Louisville & Nashville Railroad.

A. It was given in answer to Mr. Oliphant's testimony, in which he undertook to show how simple the operations were south of the Ohio River, as compared with the operations north of the Ohio River.

Q. You showed they were very onerous.

A. I showed that they were not anything like as simple as what Mr. Oliphant had undertaken to describe. I further stated that I would not undertake to describe the operating conditions north of the Ohio River. That evidence appears right along with what you have been quoting, and you might also have quoted that.

H. A. HOLLOPETER, testified on behalf of the respondent carriers as follows:

Direct examination.

By Mr. Cronk:

I am traffic manager of the Terre Haute Chamber of Commerce at Terre Haute, Indiana. During the past six years [fol. 528] I *I* have been handling the general traffic work for the Indiana Consumers Gas & By-Product Company of Terre Haute, on whose specific behalf I am appearing here. This company is engaged in the production of artificial gas and by-product coke. The plant was estanlished for the production of artificial gas for Terre Haute and surrounding vicinity. In the process of this production of artificial gas, by-product coke is produced and sold for foundry, furnace and domestic uses. Our coke is sold and distributed generally in the territory lying west of Terre Haute, some moves to Indiana and Southern Michigan destination, but none south. I am appearing here in support of the respondent carriers.

Exhibit 42 is a statement of the respective changes in the rates on coke from Terre Haute, Indiana, and from Birmingham, Alabama, to the more important destinations in Indiana which have occurred in the same general adjustment, which brought about the rates here under suspension from Birmingham. The Exhibit shows the rates that were in effect from Terre Haute and Birmingham as of March 14, 1934, and the rates that were published to become effective March 15, and later, including those rates here under suspension. The rates published to become effective March 15 from Terre Haute went into effect and are still effective, containing both increases and decreases, over and under the rates of March 14th. The rates from Birmingham in the second column should be headed present and suspended

rates. The rates that are the same as or lower than the corresponding rates in the preceding column as effective March 14, and are present rates in effect. Rates that are higher than the corresponding rates in the preceding column are the rates here under suspension.

The principal purpose of the exhibit is to analyze the changes that have occurred from a competitive standpoint, and to show the situation that has been portrayed in a somewhat different manner. The last page of the exhibit shows that under the Terre Haute rate, subsequent to March 14, [fol. 529] there had been but four reductions, averaging 11.7 cents each, while from Birmingham there have been ten reductions, averaging 14.9 cents each.

Exhibit 43 is a similar comparison, using all destinations in the State of Illinois, having a population of 10,000 or more. It will be observed here that each of the rates, with a single exception of Murphreesboro, Illinois, on page two, that were increased over the March 14 rate, are reference marked, showing that none of the suspended rates to Illinois destinations were the rates increased by all routes. In other words, while the increases received from Terre Haute were via all routes and actually have gone into effect, the suspended rates would not close the shipper out from any of these destinations on the present rate, with the single exception of Murphreesboro. The third page of the exhibit shows the average changes, with 15 increases from Terre Haute as against 16 increases from Birmingham, averaging 21.7 cents, but under suspension. While Terre Haute had 33 decreases, they only average 12.6 cents each, as against Birmingham's 26 decreases averaging 33 cents per ton, and have gone into effect both from Birmingham and from Terre Haute, but the increases have gone into effect only from Terre Haute.

Exhibit 44 is a similar statement using all the destinations in the lower peninsula of Michigan, with a population of 10,000 or more. It shows that Terre Haute had 13 increases averaging 19.4 cents—the Terre Haute increases have gone into effect, but the Birmingham increases have not—and Terre Haute had but 3 reductions averaging 8.4 cents, while Birmingham, to the same destinations, had 9 reductions averaging 12.2 cents per ton, which have gone into effect.

[fol. 530] Exhibit No. 45 shows how the earnings under the rates, from the rates here under suspension, as well as

the rate, corresponding rates retained in effect, thereby, compared with earnings under other present rates from Birmingham to these points in Central Freight Association territory for corresponding distances. Most of these figures are in other exhibits submitted by the Southern witnesses, but they are not in the form we have set them up for ready comparison here. These other present rates used for comparison here are commission fixed rates, and have been in effect since March 15, 1934, and are the rates which now move traffic, if any moves, and they are not here under attack. The earnings, based on the average load of 34 tons per car is because that figure was observed by the Commission to be the approximate average loading of coke in C. F. A. territory. My exhibits are designed to rebut the evidence of the Southern carriers showing the rates from Birmingham into the C. F. A. territory compared, or rather showing them at the same time, in the same exhibit with suspended rates, and they also showed them with other scales and other bases and with rates on other commodities. I do not mean to say the Southern carriers showed incorrect rates. I think they have shown in most instances at least the same rates we show, but we are showing,—our purpose is to compare the rates in what we think is a little different and more clear manner. That is the rates under suspension, as well as the present rates, which part of the Southern protestants proposed to support, compare them with Commission fixed rates, which the Commission has often said is the best test of the reasonableness of any rate. [fol. 531] This idea is for the purpose of establishing the fact the rates under suspension from Birmingham are fair and proper rates. It goes to the measure of the rate in the same general territory.

The exhibits submitted by witness Behring showed many of these rates, perhaps most of them and certain additional rates, simply setting them in, and we had to go through and sort them out to see what the true picture was, how many reductions and increases they had, and they also contended that they were competitive with the Northern shippers and must have a reasonably related rate. This purpose of this is to show more clearly just what the competitive relationship is in those rates. We show what increases or reductions were actually made in our rates, as compared with those from Birmingham. They have been showing the

history of rates, increases and decreases received over a period of years, and I show in this adjustment the Northern producer has received similar treatment to the treatment the Southern producers would receive if the suspended rates went into effect. It is simply rebutting the evidence put in by the Southern carrier witnesses, in showing *that* the same evidence in a clearer and more comprehensive form, to show the true condition of the relationship in the rates. It is the purpose of these exhibits to show that the protesting respondents have distorted the situation to the extent that they, in complaining of their rate relationship with the Northern producers did not show the increases and reductions which the Northern producer has received corresponding to the increases and reductions that would occur in the Southern rates if the suspended rates went into effect. We just wanted to complete that picture.

I call attention to the first comparison on the exhibit, which is Elkhart, Indiana. The distance from Birmingham to Elkhart is 651 miles. In the next column after miles, it shows first the suspended rate of $4.80 and the [fol. 532] present rate to Elkhart of $4.65, and immediately following that in the next column the respective per car earnings under those rates, and in the last column the difference in the per car earnings between those two rates. The next line of this exhibit shows how the present rate, commission prescribed and commission fixed from Birmingham to Aurora, Illinois for 653 miles compares with the rates here under suspension, and the present rate. By the Commission prescribed rate, I mean the rate prescribed by the Commission in I. & S. 3511, 194 I. C. C. 840. The decision speaks for itself. The distance of 651 miles is the shortest possible distance, via existing connections, from Birmingham to Elkhart. The distance from Aurora, Illinois, to Birmingham is 653 miles, and the present rate in effect today is $4.80. That is a rate that went into effect on March 15, 1934, and it is a reduction under the former rate. In connection with this exhibit I want to state that the rates to the points used for comparison, in this instance Aurora, Illinois, apply throughout a similar territory to that rate applying to Elkhart. The traffic can and often does move over the same rails from Birmingham to the Ohio River, whether destined to Elkhart, or to Aurora. And beyond the Ohio River, it moves through Central

Freight Association territory in both instances. The same can be said with regard to all of the other comparisons in the exhibit.

Exhibit 46 is a similar comparison, but taking the destinations to which there are suspended rates in Illinois, that is, out of the former exhibits, destinations of 10,000 population or greater.

[fol. 533] Exhibit 47 is a similar exhibit, using the suspended rates to the State of Michigan, the Southern peninsula of Michigan. I just want to make one further statement in connection with Exhibit No. 42, submitted by Witness Widell. I simply want to state that the producer at Terre Haute uses eastern coal in approximately equal proportions in the production of our coke. And our coal costs, or rather our coal transportation costs from the inner and outer crescent to Terre Haute are $4.11 per ton of coke produced. For example, in connection with Exhibit 42, we would make our charges at Chicago, using the $4.11 inbound coal transportation costs, in connection with our $2.25 coke rate from Terre Haute to Chicago, a total of charges in Chicago of $6.36. The rate on coal from Terre Haute to Chicago is $1.65. The rate on coke is $2.25. The coal rate from Terre Haute to Indianapolis is $1.13. The [fol. 533½] coke rate is $1.60, under the scale for 72 miles, as shown on Exhibit 42. So far as my information goes with respect to rates on coal from the Terre Haute District, and the rates on coke, it is true that the rates on coke are uniformly higher than the rates on coal. They are considerably higher. I think in every instance they are higher. I know of no instance where they would be lower, except that the coal rates from Terre Haute are made on a group basis, that is, group of origins, and the coke rates are made on a point to point mileage scale. Terre Haute is in the northern group as to the coal. As to coal rates, which I say are uniformly lower than coke rates out of Terre Haute, I would say all of the coal rates and all of the coke rates have been prescribed by the Interstate Commerce Commission, or by the Indiana Commission where they are intrastate rates, throughout central freight association territory and quite generally into western trunk line territory. The coal rates are Commission made rates. The $4.11 figure I have just cited is supported by these figures: Our inner crescent coal rate is $2.87, and the outer crescent rate,

$3.02; 50 per cent each, using 1.4 tons of coal for each ton of coke.

Mr. Reynolds: I want to say this, in order that my position may be made clear on this record, that I don't think the inbound coal rates of any sort have anything to do in the world with this case, and I don't think we ought to go into it.

Examiner McGrath: Am I to understand that you are objecting to this witness' testimony. It is merely directed to testimony introduced by Mr. Widell.

Mr. Reynolds: I am not making any formal objection, but I just wanted the record to show that is my position in that, that the coal rates haven't anything in the world to do with this case.

[fol. 534] Cross-examination.

By Mr. Norman:

Our rates from Terre Haute, Indiana, were checked in on a checking scale originally. The C. F. A. carriers had a checking scale. That was departed from of course from time to time in certain instances because of various factors. We do not ship into Ohio from Terre Haute. Ashland and Portsmouth didn't get as many reductions or as many increases as we did, because that includes Ohio and Michigan points, where we don't meet them particularly. In regard to the Illinois territory, I would not say that it is true that we have got all of these increases, and that Ashland, Kentucky, got practically nothing but reductions as high as 60 to 70 cents a ton. I think it is true that Ashland and Portsmouth got some very—or rather important reductions to Illinois, because they had not been shipping greatly into that territory prior to the prescription of the scale in Docket 3511.

Cross-examination.

By Mr. Mohr:

We ship principally the foundry or domestic coke. At certain times the preponderance is domestic. I would say, according to economic conditions, when the foundries are not operating very extensively we have to ship more of it as domestic coke. It would vary from time to time. Our

volume is greatly reduced; we are cut down to about half of what we were a few years ago, because of the demand. We are producing approximately something like less than 300 tons a day at our plant, our capacity at the present time [fol. 535] is about that much. We are not operating even the restricted number of ovens to capacity. We have cut down the number of ovens that we are operating within the last year and we are not operating those ovens to their capacity. Our movement is anywhere, where domestic and foundry coke is consumed.

I think we ship to most of the destinations shown in Exhibits 42, 43 and 44, except to some of the Michigan points we do not ship as extensively in Michigan as we do in Illinois. We ship to about 80 per cent of the destinations shown on those exhibits in Illinois; perhaps not so much in Indiana and Michigan. We are right at the western boundary of Indiana, and when we come back east we are doing what Mr. Widell showed in his exhibit here, we are bringing coal into our point and back hauling it as coke. We ship to a good many points in Indiana and Illinois and Michigan which are not shown in Exhibit No. 42, that is cities of less than 10,000 population, which would use domestic and sometimes foundry coke. We ship throughout Indiana, Michigan and Illinois. Most of our production, however, of course naturally moves west of Terre Haute.

Redirect examination.

By Mr. Day:

East Chicago is nothing more than a point in the Chicago switching district, taking the Chicago rates, and wherever points in the Chicago switching district are shown they reflect the Chicago mileage and rate.

[fol. 536] (Hearing of September 13, 1934)

C. E. WIDELL, recalled as witness for protesting shippers, testified:

Direct examination.

By Mr. Reynolds:

Mr. Reynolds: Will you refer to your Exhibit 32, Mr. Widell. If I understand that exhibit, you figured your

percentages by adding the rates you have shown in the different columns, and dividing them by 20, there being 20 destinations in the first column, the first block, rather?

Mr. Widell: That would be true for the figures opposite the word "Average." In other words, on Sheet 1 of Exhibit 32, under the column headed "Present rate," the average is 425 cents. Under "suspended" column or heading, rather, the average is 467.

Cross-examination.

By Mr. Day:

Beginning at Toledo, and a line drawn southwardly from Toledo by the Pennsylvania Railroad through Columbus to Cincinnati, beginning on that line, and westward, the general basis, from Chattanooga was intended to be the same as from Connellsville, except to points in I. F. A. territory to points specifically outside of the influence of the 416 rate to Chicago on intermediate application. To points like Peoria and Springfield, the Chattanooga rate was made the same as from Connellsville, and that would be true over as far as a line dividing what we call "Egypt," Southern Illinois, from the rest of the state, where the St. Louis rate would hold and control the intermediates. It is true today as it was eighteen years ago. The rates are intended to be exactly the same from Connellsville to the same destinations, and that was especially reflected in our January 1, 1923 adjustment, where our rates were put on the full Official Classification basis, reflecting 40 per cent increase as of August 1920.

[fol. 537] The bulk of the movement to Detroit is shown on sheet 2 of Exhibit 34. Out of that total movement of 7,818,900 pounds for the fifteen months period, in 1934, the first three months, that is the first quarter, we moved 7,712,100 pounds.

The rates from Chattanooga to points in the South are blanketed, because of the fact that the rate would be made to the more important consuming points, and in the South we have long stretches of small towns, and cross roads, with the result that we blanket a rate then back for perhaps forty or fifty miles. Exhibit 37 shows the beginning of the Nashville rate as of July 1, 1915, originally $1.25, but on sheet 2 of the exhibit character "6" in the bracket, shows that the rate was reduced to $1.05 effective October 18, 1915, made

the same as the coke and coal rate from Rathburn, Tennessee, north of Chattanooga, on the old Cincinnati Southern, and that rate changed by the various increases is today $1.80. That was used as a basis for the intermediate points when rates were established to local stations on the N. C. & St. L., and it was blanketed back to Bell Buckle, Tennessee. The $1.64 rate in the preceding group reflects a local adjustment on the N. C. & St. L., distance considered, on beehive coke from Coleman, Tennessee. The rates in the South were made with regard to, or some regard to the distance, and generally with regard to the prevailing rates on coal, because that principally is our competition in the South. Orig-
[fol. 538] inally rates on coke in the South were the same as on coal except to the Mississippi Valley.

Coke is at least from 50 to 75 per cent higher in value than coal. The prevailing price on the highest grade of coal in Chattanooga is about $3.00, that is, I am speaking of delivered in Chattanooga, $3.60 per ton, wholesale to the wholesale yard. Coke in Chattanooga is delivered there for $4.50 in the dealers yard, so that lump coal, lump or block coal is to coke as $3.60 is to $4.50. The best domestic coke in Detroit would bring $6.25 at the wholesaler's yard. Foundry coke in Chicago is $8.50 f. o. b. ovens, plus 75 cents
[fol. 539] switching charge, or $9.25 at dealer's yard. The latest figures that I have on domestic coke in Northern Illinois is $6.50 f. o. b. Chicago, plus a switching charge of 75 cents, your delivered price would be $7.25 to the dealer's yard at Chicago. Our present rate from Chattanooga to Chicago is $4.16, so if we were attempting to sell on that basis, we would net $3.09 at the ovens, Chattanooga. We could not afford to sell on that price.

Our general average loading of coke for the entire year of 1933 was 32.38 tons. For the first six months of 1934 our average was 32.53 tons. The average loading of coal on mines like the Southern and L. & N. is well up to fifty tons, or over. The general movement of coal in the South is a fill-in in general trains, there are very few movements in the South in solid train lots that I know of. The coal production and the movement on lines like the L. & N., I. C., N. C. & St. L., C. N. O. & T. P., and lines serving the same producing territory is much larger than the coke. We obtain coal from the so-called outer crescent district, principally the low volatile field, on the Norfolk & Western, in

the vicinity of Princeton, W. Va., Pageton, and in the so-called Pocahontas group on the Norfolk & Western. At present we are drawing our high volatile coal from mines on the N. C. & St. L. Railway, approximately 52 miles from Chattanooga.

In former years there was a movement from C. N. O. & T. P. group 2 mines shown in Exhibit 39, but I do know that there is a movement today from the Group 1 mines, immediately north of the Group 2 mines. I could not tell you of any specific movements from Group 2.

[fol. 540] The purpose of Exhibit 40 is to compare earnings on traffic that is of at least as high a value as coke, and generally higher. I took light loading commodities as furniture, stoves, charcoal, and mineral wool. I was familiar with this movement. Commodities like soda products, or iron and steel, lamp posts would show higher earnings, perhaps so, than for the light loading commodities.

The $1.90 cost f. o. b. mines price for coal from the outer crescent to Chattanooga shown on Exhibit 41 is the mine price per ton of 2,000 pounds, and the $2.80 rate for the same coal would be the rate from Norfolk & Western mines mentioned to Chattanooga. Similarly, the $2.11 price is the price per ton of 2,000 pounds of the Whitwell, Tennessee coal at the mine, and the 70 cents is the rate that would apply from the mine to Chattanooga.

Cross-examination.

By Mr. Keeler:

The price of $1.91 referred to under Exhibit 41 shows a higher price on high volatile coal than we pay on our low volatile coal. We are buying a washed, prepared, sized coal, generally under four inches. I am speaking about the coal on the price of $2.11, the Whitwell coal. The Southern coal, generally, that goes into coke, is washed. The coal from the Pocahontas Group, Norfolk & Western mines, on which we pay the $2.80 rate, and at a mine price of $1.90, that is the by-product coking coal of any character, generally though the pea and slack. We don't buy any of the Southern Appalachian coal. The 70 cents shown on Exhibit 41 from Whitwell to Chattanooga is the so-called transit rate. The rate on coal from Whitwell for delivery in Chattanooga to other consumers than coke producers

is $1.06 per ton of two thousand pounds, but on coal coming in to Chattanooga for coking and reshipments by rail the rate of 70 cents put on my Exhibit 41 is the rate. So far as I know the Northern producers of coke do not have any [fol. 541] such special rates on coal into their plants on coal that is to be coked and reshipped. The average distance from the low volatile fields from which we draw our coal to Chattanooga is 458 miles. We can take coal from Southern West Virginia to Chattanooga, there mix it with coal which comes in under the special coking in transit rate, from Whitwell, and deliver our manufactured product today at Detroit at $5.51 a ton, or 59 cents a ton greater than Hamilton, Ohio, can take coal from West Virginia and deliver it in Detroit. From the standpoint of transportation involved I would say that that was a proper adjustment of rates. I can see nothing especially improper about the service that would be involved through Hamilton and through Chattanooga.

[fol. 542] Cross-examination.

By Mr. Cronk:

The whole purpose of Exhibit 41 was merely to show what would result from the application of these rates. It was merely to be helpful to the Examiner and the Commission. Our position is with respect to the suspended schedules, that they are, or they would produce unreasonable rates, in violation of Section 1 and rates that would be unduly prejudicial to us in violation of Section 3. According to our position, anything higher than what has been proposed by the Chattanooga carriers, would certainly be unreasonable. What we are really after is a rate that will enable us to sell tonnage in the North.

The purpose of Exhibit 31 is to show the figures as set forth under the heading of Southern District, and specifically Southern Regions, that without exception the excess production in Southern region has not been taken up in any respect whatever in excess consumption figures. Whereas, in the Great Lakes Region, generally speacking, that there is a heavy excess consumption for the years shown. Exhibit 32, sheet 1 shows the present rate to Detroit, $3.65, that is fifty cents under the Central Territory scale for the distance. All the other points in Central Territory to Detroit,

Indianapolis, and points like that, take the full C. F. A. Scale into Detroit.

[fol. 543] Recross-examination.

By Mr. Day:

The last two or three years we are drawing our coal from Whitwell. The relative amount of coal obtained from West Virginia as compared with Tennessee has been approximately the same for the past several years. I might say for the present, and possibly during 1933, there might have been not as much as 30 per cent from West Virginia in 1933 and 1934. There is no coke produced, either beehive or by-product, in the vicinity of Knoxville, except possibly what may be termed gas house coke.

Redirect examination.

By Mr. Norman:

The distance from the Whitwell, Tennessee, mines to Chattanooga is approximately fifty miles. For that distance we hauled 1960 pounds of coal to make 2000 pounds of coke.

[fol. 544] P. H. Neal, witness for Southern shipper protestants, testified as follows:

Direct examination.

By Mr. Norman:

I am Vice President of the A. B. C. Coal & Coke Company, a wholly owned subsidiary of the Alabama By-Products Corporation, of Birmingham, Alabama. We sell the output of the Alabama By-Products Corporation. Our production of coke is governed almost solely by the current demand for coke. At the present time, based on current demands, we are producing approximately 30,000 tons per month. The rated capacity of our oven plant is roughly 700,000 tons per year. Capacity depends a great deal on the character of the product you want to produce. We produce and sell coke in three general grades. By those grades I mean primarily foundry coke, then the second clas-

sification, of industrial coke, which includes that coke that goes to industrial plants for plant heating purposes, core ovens, bakeries, and coke to the water gas trade. Our third classification is what is commonly known as domestic coke. The proportions are approximately one-third each of those three classifications, depending largely on current demand. We sell a part of this output in Central Freight Association Territory. We have sold coke in that territory since about 1921. To the destinations we reach in that territory, we sell and supply foundry coke and domestic coke only. The proportion of those two classes at the present time are about in the ratio of 10 to 5, that is, foundry coke is about 10 and domestic coke is about 5. Throughout Central Freight Association territory we observe the prevailing market price of Northern coke at the various destinations. At each specific destination we meet that price. We have an irreducible minimum that we maintain for prices f. o. b. the ovens. In Central Freight Association territory, when you take the market price of Northern coke at destination and deduct the transportation costs for the movement, if it results in a realization on foundry coke of less than $4.50 per ton at the present time, we decline the business. We decline domestic coke at $3.50, with the exception of the City of [fol. 545] Chicago proper, where in order to maintain our position, we are presently receiving $3.45, the market level in Chicago being $7.75 delivered, and the present freight rate to Chicago being $4.30 per net ton. We have never been able to reach the entire territory involved, just certain portions of the territory.

As I understand the Central Freight Association territory, it embraces Michigan, Ohio, Indiana and Illinois, or at least portions, certain portions of Illinois. In the state of Michigan on domestic coke we have never been able to serve. The market price of Northern coke throughout the State of Michigan is such that we can not participate at all, so as a consequence we have never supplied any domestic coke in the State of Michigan. The same is true of Ohio. In Indiana, we find the price to be a combination of the Chicago oven level, or the Terre Haute level, plus the freight from Chicago or Terre Haute to the destination. In Illinois we have a similar situation.

A typical illustration on foundry coke is as follows: In Michigan we take for example a point like Milan, and we

find that the prevailing price of Northern coke is the f. o. b. Detroit oven price, plus the freight from Detroit to that destination, being Milan. We go down to Ohio, and we take a point like Columbus, and we will find that the market price of Northern coke at Columbus is the f.o.b. Southern Ohio oven level; plus the freight from Southern Ohio to Columbus. In Indiana, on foundry coke, we take a point like Kokomo for example, and we find the price of Northern coke at Kokomo is the f.o.b. oven level at Southern Ohio producing points, plus the freight from those producing points to Kokomo. In Chicago, we find the price is the f.o.b. oven level at Chicago, plus the uniform switching rate of 75 cents per ton, which at the present time makes the uniform delivered price within the City of Chicago for foundry [fol. 546] coke, $9.25 per ton. To a point like Galville, Illinois, which is -est of Chicago, we find the price to be the Chicago oven level, plus the freight from Chicago to the destination. So under the prevailing prices, the net result is that in the states of Michigan and Ohio, we can't sell domestic coke from Birmingham. We do sell some domestic coke in a limited way in Indiana. In Illinois, we have participated, and continue to participate up to the present time in the domestic coke market there. In Michigan, on foundry coke, there are some points where we find that the oven realization is below our minimum, and therefore we cannot participate in that market. In eastern Ohio, we are practically shut out entirely on foundry coke. In Indiana, there too are a number of points where we are unable to participate, and I mean consuming points. In Illinois we are able to participate to a better degree, I would say.

Ou- ability to participate or compete has been based upon the present rates. Taking a typical point like Detroit which is a big consuming center even the present rate to Detroit precludes our participating, the present rate being $4.65 a ton, which would result in a realization of $4.34 our oven. That, of course, is based on the present price of coke in Detroit. The rate under suspension is $5.00 a ton from Birmingham to Detroit, which would further bar us from participating in the Detroit market on foundry coke, we never having been able to participate on domestic coke at any point in Michigan. The Detroit rate fixes the transportation cost on coke from Birmingham to Southern Canadian points, within the Province of Ontario, Canada. Those rates are made on Detroit combination, Detroit being the gateway

for our coke when we undertake to enter that portion of Canada. We have done some business in Southern Canada. Our ability to reach the markets in C. F. A. territory and the conditions under which we reach them are favorable to a — marked extent now than they were a year ago and prior thereto, by reason of the heavy increases in wages, and the [fol. 547] much shorter working hours that we have had prescribed by the President of the United States, under the Bituminous Coal Code in the production of the coal necessary for our coke. The result of that has been that today, and since the Bituminous Coal Code went into effect on October 2, 1933, is that the production costs of coal in Alabama are higher, and materially higher than in any state of the United States east of the Mississippi River. That in turn affects our cost and therefore our ability to compete.

I consider C. F. A. territory a natural market for Birmingham coke by reason of the fact that that territory lies within the path of the direct or continuous flow of the coal from mines serving the producers of coke within that territory. In other words, the raw materials from which the finished product or the manufactured article, coke, required and used in C. F. A. territory, flow in the same general direction as does the coke from the South.

Q. Now, based on your experience in selling coke in C. F. A. Territory, what in your opinion would be necessary in the way of freight rate adjustments from Birmingham to enable you to reach that market?

Mr. Day: Mr. Examiner, I object to the question. I don't think it is important, or relevant or material, what this witness regards as the rate that he needs to sell in the C. F. A. markets.

Mr. Norman: Now, Mr. Examiner, of course everybody else in the world except maybe some of the representatives of these C. F. A. lines recognize the fact that the effect upon the movement of traffic does have something to do with the making of rates and arriving at what is a reasonable rate.

Examiner McGrath: Isn't that the basic inquiry here, whether the suspended rates would have that effect, on the movement of traffic, and not what he considers would be necessary to move the traffic? Perhaps it is an indirect way [fol. 548] of asking the question.

Mr. Norman: It seems to me that is an indirect way of asking the same thing.

Mr. Day: My objection is that it is irrelevant and immaterial to any of the issues involved here, as to what this witness thinks he needs in the way of a freight rate.

Examiner McGrath: He may answer.

Mr. Neal: Will you restate the question?

Mr. Day: Respondents except to the ruling.

(The question was read to the witness.)

A. My answer to that would be this, that of those scales or adjustments that I have heard under discussion here, not one would enable us to reach the entire C. F. A. territory. The present rates, that is to say, those in effect at thos moment have and do enable us to reach portions of the C. F. A. territory. In my judgment this Column 2 scale that I have heard discussed, and have seen, would enable us to reach a fairer portion of that territory, if made effective. The immediate effect upon our ability to reach that territory would be that we would be automatically excluded from more points in my judgment than we are presently excluded from under the present scale of rates. As to whether we are entitled to a lower level of rates to C. F. A. territory than obtains within that territory, strictly from a commercial standpoint, and as an independent producer of coke for the consuming trade, and by that I mean a producer who does not produce coke for any use or purpose of his own, we would ask, and we would not expect anything but an equal level of rates. In other words, we don't ask or expect any special favors.

[fol. 549] On an equal basis of transportation costs, it seems to me it is elemental that we would have to be willing to go along and take our chances in that market, notwithstanding our greater distance from the market.

We have to meet truck competition. I think if you will follow what I undertake to say by way of illustration as to how we meet the competition at destination, you will be readily convinced that if the rate from the Northern producing point is reduced in order to meet competition of some form other than the railroad, why, we would immediately suffer to the extent of the reduction, because you arrive at your destination value by adding the oven level of the Northern coke to the transportation charge from that Northern producer to destination, and it is perfectly obvious that we would be immediately affected, which would have

the effect of discrimination in that you would be discriminating against the producer of coke in the South in my judgment in favor of a producer of the coke in the North. In other words that would effect our ability to move coke from Birmingham.

Cross-examination.

By Mr. Day:

It would not help our company to have the truck competitive rates in the North cancelled and have the short haul rates on the scale basis. In fact, I think the right or privilege that is granted the carriers to exercise managerial judgment in making these rates to meet competition on these short hauls that would eliminate the movement of coke or any other commodity by rail is entirely a proper one. But I don't think that that in turn should operate against the producer of coke in the South, who is attempting to serve the market at that particular destination in the North, however. I can't conceive of a case where from our distance [fol. 550] in the South we would want a similar line of rates in the North. It would not do our company any good to have rates for those short hauls under 30 miles put up to the scale basis.

I referred to the Central Territory as a natural market for Birmingham coke. We also regard New England and the Pacific Coast territory as a natural market.

Cross-examination.

By Mr. Cronk:

In the production of our coke we use Alabama coals, blended with some Pocahontas coal. The Pocahontas fields lie north of Birmingham. If we haul coal from Pocahontas fields to Birmingham and coke it into coke and ship the coke to central territory, that portion of the coal going into the ton of coke would not be moving in the same direction as the coke to reach the market. It would be backhauled to that extent, and obviously we would not use any more Pocahontas coal than we absolutely have to have. I don't think it is a fair question to ask what proportion of Pocahontas coal we use, as it is a trade secret with us. We only

use Pocahontas coal to the extent necessary to maintain a certain volatile content in the dry coal going into our ovens. It is less than fifteen per cent of the coal volume.

We have reached New England and Western territory by water and rail combined. We reach the Pacific Coast by rail, all the way from Southern California to Washington, which includes the intervening territory west of the Mississippi River and north of St. Louis. We ship coke to Mexico, Canada and Porto Rico, and all over the South pretty generally, such as is consumed. It is pretty generally light. We do not ship to eastern Trunk Line territory. That would be the territory south of New England and east of Pittsburgh-Buffalo. We do not ship to New Jersey and eastern Pennsylvania. The *The* State of Virginia [fol. 551] is our northeastern limit. We don't go north of the State of Virginia. We ship domestic size coke to metropolitan New York, which moves combination of rail and water, via Mobile, Alabama. Mobile is our nearest and logical port. We have the privilege of three ports, Mobile, Pensacola and Charleston, South Carolina.

[fol. 552] Redirect examination.

By Mr. Widell:

The direction of the Pocahontas field to Birmingham is from the general direction of north. The coal that we withdraw from that field and mix with our other coals that are shipped goes entirely into foundry coke. Every pound of the foundry coke has the same percentage of coal in it, and we can't identify the coke as it comes out of the oven. We use Pocahontas coal and we use a lot of Alabama coal. The utilization of Pocahontas coal is simply for the purpose of maintaining a structure in the coke that will make that coke suitable and serviceable to metallurgical purposes, which is not a requisite in the case of domestic coke at all. The percentage of sales in C. F. A. territory is quite small as compared with the rest of our sales. Coke moves in a generally southward direction within the state of Illinois. As to whether there is a southbound coke movement from Indianapolis I should say there is.

[fol. 553] Recross-examination.

By Mr. Day:

Pocahontas coal is only used in the manufacture of foundry coke and not in domestic coke. Our plant is so constructed that we have two individual units, and we have two mixing plants or arrangements, and it can be operated as two separate and distinctly independent plants. There is a part of the production of the foundry coke which automatically falls into our domestic sizes, but that is an effect, rather than a cause; we don't go ahead and buy Pocahontas coal and pay $3.50 freight on it to get it to Birmingham to make that particular portion of our domestic coke, it is merely a resultant in our operations in manufacturing foundry coke. Our coke, both foundry and domestic, is approximately the same in *wau*lity and in its physical and chemical characteristics as the Chattanooga coke, and it sells for the same price.

Recross-examination.

By Mr. Cronk:

There is a coal origin adjacent to Birmingham from which we draw coal. I have no supervision over, nor am I engaged in any way in the sale of our coal. I do not know whether or not any of that coal is sold north of the Ohio River, but my idea is that there is none.

[fol. 554] A. J. Ribe, witness for the southern shipper protestants, testified as follows:

Direct examination.

By Mr. Norman:

I am an industrial traffic manager, and I here appear as the general chairman of the Alabama Iron & Steel Shippers Conference, which position I have held with that organization since about 1922. I have been engaged in railroad traffic and freight matters for approximately 26 years, first with the railroads and later with shippers. I have been actively following the rates involved in this inquiry since

1923, having attended the numerous conferences in Chicago, Pittsburgh, and at least one in New York City in regard to them. Briefly the history of the conferences and so forth that led up to the present proceeding is as follows:

First, in 1923, we sought northbound to central territory rates made differentially over Chattanooga, the same as the southbound rates, Chattanooga over Birmingham. For example, our first request for rates northbound, where the rate making distance was through the Cincinnati gateway, was 50 cents over Chattanooga. That differential was not satisfactory to the Southern carriers. Later, or about the latter part of 1925, we amended our request, to a differential of 75 cents. In referring to that differential, I would like to have it understood that that was the figure where the rate making distance was through Cincinnati. But where the rate making distance from Chattanooga was through Louisville, the differential was 50 cents.

Such a proposal outlining those bases was filed by the Southern carriers in the latter part of 1924, and that was approved by the Illinois Coal & Coke Committee in January, 1925, and by the C. F. A. Coal, Coke & Iron Ore Committee on February 5, 1925. Subsequently, or within a few months, for some reason that we were never able to develop, those concurrences were withdrawn, and on April 28, 1926, the [fol. 555] executive committee of the central territory carriers made a record that they were agreeable to joining in rates into central territory on the scale applying within central territory. And as late as 1930 we in Birmingham were informed by some of the central territory lines that it was their intention to observe that basis. That leads us up, in the way of history now, to the present suspended rates, which are different from either of the proposals that were at one time approved by the central territory lines. The Birmingham interests filed a complaint attacking our rates from Birmingham to Central territory under Section 1, and under Section 3, the rates from Chattanooga to Central territory destinations. That case was heard and disposed of with I. & S. Docket 3511.

I have prepared some exhibits. The majority were prepared by me personally, and others were prepared under my direction and supervision, and I have tried to so prepared them that I can introduce them without much oral evidence in connection with them.

Exhibit 48 lists the companies having by-product plants in Alabama. There are eight such companies. Those shown as being located in Jefferson County are in the Birmingham metropolitan district. The first plant shown in the exhibit, at Alabama City, is not in the Birmingham district, but about 55 miles northeast of Birmingham. The same is true with respect to the last plant, except that it is located about 55 miles southwest of Birmingham. The Examiner asked about the average distances the other day. I wish to state that the actual distances from Birmingham are the following amounts less than a simple average from each of these eight shipping points; 3 miles to Cincinnati, 8 miles to Louisville and Evansville; and 6 miles to Cairo. That is to say, if you took each of these points and averaged the distance to those gateways they would bear that rela-
[fol. 556] tionship to the distance from Birmingham proper. However that does not reflect the movement. For example, the two largest shippers of coke in Alabama are the A. B. C. Company with a plant at Tarrant, and the Sloss Company with a plant at North Birmingham. They ship by far more than 50 per cent of the total coke that is now shipped. Those plants are located within one mile of the L. & N. Railroad and the Southern Railway yards, serving Birmingham, whereas Birmingham itself is 3 miles from the L. & N. terminal yard and 4 miles from the Southern terminal yard.

Exhibit 48 shows the number of ovens in operation in 1929 and in 1933. There was a decrease in active ovens in Alabama for this period of 32 per cent, although that percentage figure does not appear in the exhibit.

Exhibit 49 compares for a twenty year period, namely, 1929 with 1910, the production of by-product and beehive coke by states, and for the United States. This exhibit shows that over that twenty year period the production in Alabama grew 46.3 per cent, while that for the United States it was 43.6 per cent. In the lower portion of the exhibit there is compared the production of by-product and beehive coke in the exclusive Southern states with that in the exclusive Central territory states, and call attention to the fact that the increase in the South was 4.2 per cent and in the Central States 318.6 per cent. I included beehive coke in Exhibit 49 because I could not find in the Department of Commerce statistical reports a separation of those two grades of coke for such a lengthy period. In

Exhibit 50 I have compared the 1929 production of by-product coke and for the United States as a whole, with [fol. 557] the 1933 production. Since neither Exhibit 49 nor Exhibit 50 is representative of commercial coke, excluding the large tonnage of coke produced by ovens for their own use, I have prepared Exhibits 51 and 52 to try to make a separation.

Exhibit 51 shows the total by-product coke sold in 1929 and 1933, including coke sold for furnace use. It will be noted that the decrease for this five year period in the South of coke sold was 39.3 per cent, while for the Central States shown, plus the states of Ohio and Pennsylvania, the decrease was 16 per cent.

Exhibit 52 compares the by-product coke sold, by grades, 1929 and 1933. In 1933 the production in Alabama and Tennessee on domestic coke was approximately 6 per cent of that shown for the Central territory states, also that over this five year period our sale of domestic coke decreased 24.1 per cent, while that in the northern states shown it increased 36.3 per cent.

Exhibit 53 shows by states, and for the country as a whole, the by-product coke ovens built, abandoned, and in existence on December 31, of the four years indicated. During 1929, Illinois, Indiana, Ohio and Pennsylvania built 335 ovens, new, and abandoned 77, making a net increase of 258 ovens. In 1930, Illinois, Michigan, New York and Ohio built 257 new ovens, and abandoned 186, with a net gain of 71. In 1931, Illinois, Indiana, New York and Ohio built 276 new ovens, and abandoned none. In 1932, Alabama abandoned 140 ovens.

Exhibit 54 compares the coke stocks by states, as of January 1st, of the years indicated. In 1933, our stock of coke in Alabama, which was 605,399 tons, exceeded the stock in Illinois, Indiana and Michigan, combined by 38.185 tons.

Exhibit 55 was prepared to determine the amount of coke originated by carriers in Southern territory, compared with that originated by carriers in Official territory. For the purpose of designating official territory I used the eastern [fol. 558] district as included in the Commission's statistics plus the Pocahontas region. The period covered is five years and three months ending with March 31 of this year. The total tons of coke originated by the Southern lines over

this period of 63 months is approximately 8 per cent of the tons of coke originated by the carriers in official territory. The exhibit shows that in both territories more coke is originated than terminated.

Exhibit 56 shows the average loadings on coke for the year 1932, and that the average loading in the Southern region for that year was 6½ per cent higher than that for the Pocahontas, Great Lakes and Central or Eastern region.

Exhibit 57 compares the I. F. A. Scale prescribed in the Indiana case with the C. F. A. Scale prescribed in Docket 3511, and in the heading the two distance formula. It will be noted that on the whole the C. F. A. Scale is an average of 6 cents per ton higher than the I. F. A. Scale, and that the excess occurs in the longer distances to a greater extent than in the shorter distances.

I made an- introduced, in I. & S. Docket 3511 and Docket 22052, a revenue test on the shipments of coke to central territory from all of the Alabama shippers during the year 1929, except one shipper. Their data did not reach me until after the test was made, so I now present in Exhibit 58 that revenue test on the 1929 shipments to which the shipments of the one shipper previously excluded is now added. The details are shown on pages 2 to 8, and the results under the recapitulation on the title page of the exhibit. Excluding the Ohio River points, which are on the border between Southern and Central territories, it will be noted that under the rates prior to March 15, 1934, as applied to all of our 1929 shipments, the rates resulted in strictly weighted average of $4.42 per ton. Under Column 3, applied rigidly, the Birmingham rates based on this 1929 test would be in-
[fol. 559] creased the weighted average of 18 cents, and under the Column 2, our rates would be reduced a weighted average of 25 cents.

In the Docket 3511 hearing a revenue test was presented by the Chattanooga shippers on their 1929 shipments, using the I. F. A. scale as the base. I have taken that test, with the details shown therein, and prepared a new one, using the Column 3 and Column 2 rates, and this test is presented in my Exhibit 59. Under the Column 2 scale, the Chattanooga rates, excluding Ohio River points, the rates would be increased based on this test 40 cents per ton on a weighted basis, and under the Column 3 scale, 80 cents per ton.

Exhibit 60 combines the tests made in Exhibits 58 and 59, and shows that, excluding the Ohio River points, the Column 3 scale would advance the Birmingham and Chattanooga rates a weighted average of 35 cents per ton, and that the Column 2 scale would result in a weighted average reduction of 7 cents per ton. If the Ohio River towns be included, the advance under Column 3 is 40 cents and the reduction under Column 2 is 1 cent.

In Exhibit 61 I have made a present check and revenue test on all shipments of coke from Alabama during the year 1933 to the Ohio River crossings, and the states indicated. I have tested the revenue under the rates prior to the March 15, 1934, change, the revenue under the rates effective on March 15, 1934, and the revenue under Columns 2 and 3. The revision of March 15, 1934, at which time the Column 3 scale was observed as a maximum, resulted in a weighted reduction of 2 cents per ton. If the Column 2 rates had been applied to this movement, the reduction would be 17 cents per ton, and under Column 3 the increase is 27 cents per ton. That is as compared with the rates prior to March 15, 1934.

Having no way to test the level of the Southwest Virginia rates to central territory, because of lack of data covering movements other than generally, as indicated in the heading of Exhibit 62 I have made an effort to deter-
[fol. 560] mine just what the level of those rates is. For the purpose of my exhibit 62, the destinations used were not selected by me but were taken from exhibits filed by witness Drescher of the L. & N. Railroad in that case and witness Hollopeter in I. & S. Docket 3511. At the conclusion of page 2 I have shown the simple averages. According to this showing the Southwest-Virginia rates under Column 3 would be advanced an average of 31 cents per ton, and under Column 2, a reduction of 7 cents on the average would occur. If the advances and reductions as shown in detail on this exhibit are compared with the 1929 movements, as shown by states in the heading of the exhibit, it will be found that the movements were the heaviest where the advances would be the greatest.

Going back to Exhibit 61, I call attention to the first three columns on the title page headed weighted average distance. By weighted average distance, I mean exactly what the term

implies, except that those distances were determined based on the rate making distances and not on the route of movement distances. They were determined by finding the total number of ton miles up to the Ohio River and dividing that total by the number of tons. The same operation was performed north of the Ohio River, so that the result on a weighted basis is that excluding the Ohio River, our Alabama coke, based on our 1933 performance, traveled 363 miles within southern territory, 270 miles within central territory, or 633 miles through.

[fol. 561] Exhibit 63 shows the level of the Alabama coke rates in Southern territory. In this exhibit I have taken all of the shipments by all of the Alabama producers of coke during the year 1933 to points in Southern Classification territory except Ohio River towns and the Florida peninsula, and tested the existing rates by applying the Scale 2, using the same formula for the distances as was prescribed in Docket 3511. The results of the test, as shown on the title page, is that if the Column 2 scale had application within the South the rates from Alabama to points in the South would be advanced 6.55 per cent.

Exhibit 64 is a comparison to points in Eastern Ohio and the State of Michigan to which rates were proposed from Birmingham by the Southern carriers in the latter part of 1924 and approved by the C. F. A. Coal, Coke & Iron Ore Committee on February 5, 1925, with the rates to the same destinations from Birmingham that these C. F. A. carriers are now demanding. It will be noted that the rates now being demanded are an average of 40 cents higher than the rates previously approved, or approximately 9 per cent.

Exhibit 65 compares the scale proposed by the C. F. A. carriers in Docket 3511 as the maximum reasonable scale for Central Territory with the Column 3 scale. Attention is called to the fact that for the shorter distances the Column 3 rates are both lower and higher than the scale that was proposed by the C. F. A. carriers, whereas, for the longer distances, beginning with 500 miles, invariably the Column 3 scale is higher than that formerly proposed by the C. F. A. carriers reaching an excess of 43 cents in one instance.

Exhibit 66 compares in mileage blocks of five miles, the same scale as was proposed by the C. F. A. carriers in Docket 3511 with the Column 2 scale approved in the I. & S. 3511 proceedings. Attention is called to the fact that for

[fol. 562] each 100 miles the witness averaged the differences that the Column 2 scale are under the maximum scale that was proposed by the C. F. A. carriers. When I refer to the C. F. A. carriers' proposed scale I mean the one that was rejected by the Commission in Docket 3511, my purpose being to point out that for 100 miles, the Commission-made scale is an average of 11 cents under what the C. F. A. carriers proposed. From that point it climbs, being an average of 25 cents for distances 100 to 200 miles, 31 cents from 200 to 300 miles, on up to 34 cents for distances 400 to 500 miles. Beyond 500 miles the Column 2 scale gets less as the distances increase, being an average of 11 cents for the last 100 miles, ending with 800.

To test the reasonableness or unreasonableness of the column 3 scale for application from Birmingham to Central territory, I made a test of our rates from Birmingham to Texas, using the actual movement during the year 1933. During — year, in round figures, we shipped from Alabama to Texas 12,800 tons, which moved 308 miles within Southern territory and 426 miles within the Southwest.

Those average distances are again weighted averages, determined by ascertaining the ton miles in each territory, and dividing such tables by the number of tons. Notwithstanding the fact that the haul within the Southwest is considerably more than 50 per cent, our present rate level to Texas is approximately the Column 3 level. That information is shown at the bottom of page 2 where I used 100% as the index for the Column 3 rates, and the comparable figure or our rate to the Southwest is 102 per cent.

Exhibit 68 compares all points in Central and Illinois territories, receiving 500 tons or more of coke during the year 1933 from Alabama, with rates within the South for comparable distances. To get such comparable distances from Birmingham I had to go to Jacksonville, Florida, and into the Carolinas and Virginia. The purpose in preparing this exhibit was to try to match the rates, movement with movement. I started out by taking the Southern destinations for comparable distances receiving 200 tons or more of coke from Birmingham in 1933, but in four instances I failed and had to use points like Danville, Virginia, that [fol. 563] received less than 200 tons. The distances here are worked out on a weighted average basis. Shipments from Birmingham to the Central territory points shown move an average distance of 657 miles on a weighted basis,

and the average of our present rates is $4.46 on a weighted basis. In comparison with that, the shipments within the South moved 644 miles, with an average rate of $4.25 on a weighted basis. Some Virginia points are shown there. The C. & O. and N. & W. have recently made some substantial reductions in their rates from South Ohio to common points in Virginia as between those carriers and the Southern lines. I do not have all of those reductions but I will illustrate with Richmond and Lynchburg. To Richmond for a distance of 431 miles, these carriers have established a rate of $2.85 which is 70 cents per ton lower than the Column 2 Scale. To Lynchburg, for a distance of 326 miles, they have published a rate of $2.50 per ton, which is 55 cents per ton lower than the Column 2 Scale. Those rates are published in C. & O., I. C. C. 10-799. I do not have the N. & W. reference. The basis for those reductions I understand was competition. Under the restricted concurrences which those same railroads have filed, which are under suspension, the Southern carriers could not make any such reductions in rates for their shippers from Birmingham to this territory.

Exhibit 69 compares the per ton and per car mile earnings under the Column 2 scale for selected distances, with the ton mile and car mile earnings on lime, prescribed by the Commission from the Woodville, Ohio, district, close to Toledo, Ohio, to points in Florida. It will be noted in every instance, under these maximum prescribed earnings on lime, that both the ton mile and car mile earnings are less than under the Column 3 scale on coke. Finishing lime produced in Ohio is of a higher quality than that produced in the South and has a value today of eight dollars per ton, f. o. b. the Ohio shipping points. That is the code price for that grade of lime. The average loading on lime is somewhat less than the average loading on coke.

[fol. 564] Exhibit 70 shows the tons originated and the tons carried during the years 1929 and 1932 by Class I carriers in the Southern region. The Class I carriers in the South reaching coke oven shipping points, either in Alabama, Tennessee or Kentucky, are designated on this exhibit with an asterisk. There are ten such carriers, and of these the A. B. & C., Central of Georgia, S. A. L. and Southern Railway have no route to the Ohio River, except that the Southern Railway has what I would consider an unnatural route in connection with the Northern Alabama

Railway, through Corinth, Mississippi, and M. & O. with Grand Junction, Tennessee, and I. C. However, that route is not used, and if the figures for the Northern Alabama are examined, it will be noted that the tons of coke they carry are very light. Incidentally, the Northern Alabama route is the natural route of the Southern Railway, to and through the gateway of Memphis, Tenn.

Exhibit 71 compares carload costs for hauls of 300 miles, as taken from a statement published by the Interstate Commerce Commission, and designated as I. C. C. Statement 3120. Concerning the grade or rate of progression in the Column 3 scale, I have shown that during last year our average haul on Alabama coke to C. F. A. territory was 633 miles. At 600 miles, in the Column 3 scale, the rate is 325 per cent of the rate in the same scale for 50 miles. Using the same distances, the relationship under the scale that the C. F. A. carriers proposed, and which Mr. Day has referred to as having been rejected, is 308 per cent. Under the Southern first class scale, it is 307 per cent; under the Official territory first class scale, 286 per cent. I have a number of other comparisons here, but those are illustrative of the high grade of the Column 3 scale. There is no allowance made in the Birmingham District to the coke plants by the carriers for the switching and spotting of cars. We [fol. 565] do our switching and spotting, and weighing and receive no allowance from the carriers for that service.

Mr. Norman:

Q. Are such allowances generally made to the coke plant in C. F. A. territory?

Mr. Keller: I object to that question.

Mr. Cronk: I also object to that question.

Examiner McGrath: Do you wish to press that question?

Mr. Norman: Well, I prefer, Mr. Examiner, that the objection to it be sustained, because I want it as a precedent to some other things. In other words, I don't care to withdraw the question.

Examiner McGrath: The Examiner does not desire to exclude anything that is really relevant here, but it does not occur to him at this point that it is relevant. But if you think otherwise——

Mr. Norman: That ruling is satisfactory to me, but I just want it as a precedent for some of these other things that are being talked about here.

Q. Mr. Ribe, the question has just been raised as to the southern shippers desiring rates that are less than just and reasonable rates. I wish you would state the position of the interests for which you appear.

A. The interests for which I appear believe, based on our investigation, for which I have here presented, that the application of Column 2 from Birmingham to Central territory would represent maximum reasonable rates.

Q. Are the interests that you represent asking for anything less than reasonable rates.

A. No, sir.

[fol. 566] Cross-examination.

By Mr. Day:

The study made by the Commission's Bureau of Statistics shown in Exhibit 71 was not made in a hearing. It was based upon the performance of the carriers in 1928. The corresponding figures for the Chesapeake & Ohio are $53.82 and $68.43; Norfolk & Western, $55.59 and $73.72; Pennsylvania, $77.66 and $85.23; B. & O., $70.32 and $79.14; Big Four, $57.70 and $63.83; Detroit, Toledo & Ironton, $89.91 and $100.48; Bessemer & Lake Erie, $55.65 and $75.49; Monongahela, $68.24 and $106.92; Cincinnati Northern, $53.05 and $67.00; The Hocking Valley, $44.08 and $59.54; Michigan Central, $59.61 and $60.45; The Nickel Plate, $58.45 and $59.03, Pittsburgh & Lake Erie, $69.48 and $92.95. The statement shows only the costs for hauls of 300 miles.

I do not know the circumstances under which the C. & O. and Northwestern roads reduced their rates to Richmond, Lynchburg, and the other Virginia points.

When I referred to the C. F. A. carriers proposed scale in I. & S. Docket 3511 I was speaking of the scale that Mr. Kern offered in that case as maximum reasonable for the Central territory. In I. & S. 3511 Mr. Kern supported the Northern shippers in advocating rates from the South made twenty per cent higher than those in the north, mile for mile. I recall they proposed an arbitrary of 20 per cent, but I don't recall whether that was to be on the haul up to the river or through.

So far as my so-called revenue test exhibits are concerned with respect to the showing to the Ohio River crossings, there is no change proposed in the rates to the crossings

from Birmingham, and that is the reason why in these studies I have separated the Ohio River crossings from the other points here. The rates are exclusively for movements within Southern territory.

[fol. 567] Cross-examination.

By Mr. Keeler:

The Semet-Solvay Company has a coke plant at Ashland, Ky. They have a plant or interests closely allied with it at Hopewell, Va. The rate of $2.85 referred to was put in from the Southern Ohio points to Hopewell, and it affected the rates to some intermediate points only by reason of the Fourth Section. That is the explanation on some intermediate points, but what the explanation for a $2.50 rate at Lynchburg is, I don't know. That is 35 cents lower than the rate shown to Hopewell. I haven't got the effective date of the rate to Lynchburg or even the Hopewell rate here. The tariff authority for the rate to Lynchburg is C. & O. I. C. C. 10799. Representations were made that there was competition from Southern coke by water, and I think foreign competition moving into Hopewell by water, so that it was in effect a rate that was made to meet competition from other points by water.

[fol. 568] Cross-examination.

By Mr. Widell:

I haven't the slightest idea what accounts for the $2.50 rate to Lynchburg. I know Lynchburg is not on the ocean, but whether or not it is on water I don't know. I know it is considerably interior in Virginia and Hopewell is also, but they have got a body of water that reaches up to Hopewell.

Cross-examination.

By Examiner McGrath:

Our position is that the suspended rates, if approved, would establish undue or unlawful prejudice against us to this territory. Our reasons for that contention is that the grade of the Column 2 scale itself is sufficiently high to justify its application from Birmingham. The scale is rela-

tively all right for longer distance and low for short distances. Our position is that that level is too high for transportation within C. F. A. territory for the long hauls, and I think they are low for the short hauls. We contend that the same level of rates should obtain from Birmingham as from C. F. A. points to the destinations in that territory, based on transportation conditions and our rate level within the South, our rate level on coke to the Southwest, and on the showing presented in my Exhibit No. 70 also.

Witness states he will file, within fifteen days, list of the carriers having rails in the destination territory here involved that are not parties respondent here and did not file withdrawal of concurrences nor have rates published for their account.

[fol. 569] F. A. DOEBBER, testified on behalf of the Northern Respondents as follows:

Direct examination.

By Mr. Cronk:

I am connected with the Citizens Gas Company of Indianapolis. It is incorporated under the laws of the State of Indiana and is engaged in the manufacture of coke, gas, tar, and sulphate of ammonia. It operates as a public utility in the manufacture and distribution of gas in the City of Indianapolis and immediately contiguous territory. It is the sole distributor of gas in that territory. As a public utility its rates for gas are regulated by the regulatory commission. We in no way control the quantity of gas produced. The quantity of gas that is produced is controlled by the requirements of the industries and private consumers of Indianapolis. The quantity of coke produced is in direct relationship to the amount of gas, whether or not the market absorbs the coke or not, so we are unable to control the quantity of coke produced.

We use high volatile and low volatile coal in the manufacture of coke. They originate in the states of West Virginia and Virginia in what are known as the inner and outer crescent fields in those states. We do not use the Indiana and Illinois coals in the manufacture of coke. One and four-tenths to one and five tenths tons of coal are required per ton of coke. We use nothing but the best

grades of high and low volatile cokeing coals, coals that ordinarily bring a premium in price when compared with the costs of the ordinary commercial coals from the inner and outer crescent fields. It is extremely important that these coals be as low as possible in sulphur and ash contents, because these elements cannot be eliminated in the process of carbonizing the coal, and are therefore found in the coke. Excessive ash and sulphur in foundry coke are an absolute detriment to its sale, because these elements when prevalent in the coke in excessive quantities are decidedly injurious to good and efficient metallurgical processes and practices.

[fol. 570] The freight rate on the inbound coal is $2.52 per ton of 2,000 pounds on the high volatile coal and $2.62 per ton of 2,000 pounds on the low volatile coal. We mix about sixty per cent high volatile and about forty per cent low volatile, but at times the mixture gets to a point where it is fifty-fifty. It is dependent upon the character of the coke we desire to make. The total transportation charges on the quantity of coal required to make a ton of coke is $3.71, based on a figure of 1.45 tons of coal required to produce a ton of coke. Aside from the cost of about 1.5 tons of high grade coal, the freight rate on the coal required to produce a ton of coke is $3.71, and the freight rate on the coke to Grand Rapids is $2.65, making a total cost for the transportation alone of $6.36.

We operate two coke plants in Indianapolis, with 120 ovens at one plant and 41 ovens at the other. Both plants are within the City of Indianapolis. The potential capacity for coal consumption of these two plants is approximately 3100 tons per day of 1,131,500 tons per year. The potential coke producing capacity is approximately 2,356 tons per *ton*, including the breeze or fines, or 859,940 tons per year. The 41 oven plant is not operating on account of poor business conditions and the other plant is being run at about sixty or sixty-five per cent capacity. We have been in business since 1909. We foundry, furnace, egg, stove, chestnut, pea and what is called breeze coke, and those that come within the general designation of domestic sizes are egg, stove, chestnut and pea coke. Foundry coke is used for metallurgical purposes. Our furnace coke is used for rock melting purposes and in water gas plants, although furnace

coke is that size or kind of coke that is generally used in open hearth or blast furnaces for the production of iron and steel. Egg coke is used in brass foundaries, bakeries, and in manufacturing plants, for various industrial purposes. Egg, stove and chestnut coke are used for heating apartment houses and private homes. Pea coke is used for [fol. 571] home heating, and some industrial purposes. Breeze coke is generally used by our company as boiler fuel in our own plant.

Our shipments principally move to Indiana, Illinois, Ohio, the lower peninsula of Michigan, Iowa, Wisconsin, Minnesota and Missouri. Plants with whom we compete with are located generally throughout Central Freight Association territory, and plants in the South, at Chattanooga, Tennessee, and Birmingham, Alabama, and also beehive coke ovens of the Wise County District of Virginia.

Exhibit 73 is a comparison of the present rates on coke. The right hand column of the exhibit shows the percentage relationship that the present rates bear to the prescribed rates. The rates shown from Indianapolis, under the column headed I. & S. 3511 rate, are those prescribed in the Appendix 8, Column 2 of that decision, for application within C. F. A. territory, generally, and became effective on March 15, 1934; in I. & S. Docket 3511, the rate shown from the three origins are those prescribed in the same decision; and under Column 3 of Appendix 8, to cover the overhead adjustment from the South to the North. It will be noted that although the present rates from Indianapolis to the destinations shown are one hundred per cent of the I. & S. 3511 rates, in every instance, the present rates from the Southern coke producing points range from seventy to ninety-nine per cent of the I. & S. 3511 rates.

Taking Toledo, Ohio, the 4th point on Sheet 1, as an example, the present rates bear the following percentage relationship to the 3511 rates. Indianapolis, 100 per cent; Birmingham, 91 per cent; Chattanooga, 70 per cent, and Wise County, Va., 78 per cent. Many similar rate anamalies could be shown with a correspondingly wide variation in the rate levels.

The distances shown on the exhibit represent the actual short line mileages via the routes indicated on Exhibit 74. By way of preface to the introduction of Exhibit 74, the Commission's order in Docket 3511 and the cases associated therewith required that the rate changes involved therein

[fol. 572] be made effective March 15, 1934. The coke rates in C. F. A. territory were changed on that date, with the result that they generally harmonize with the reasonable maximum scale prescribed by the Commission for C. F. A. territory. Rates below the scale were generally brought up to the level thereof and the rates above the scale were reduced. The rates from Birmingham and Chattanooga to C. F. A. territory were also changed on March 15th, but only in those instances where the rates exceed the Column 3 scale prescribed for application from the South to the North. In other words, the rates that exceeded the Column 3 scale were generally reduced, but those below the scale were generally allowed to remain unchanged.

The rates from the Wise County District in Virginia to C. F. A. territory were not changed on March 15th, and there has been no change to date. The L. & N. Supplement No. 16 to its tariff I. C. C. A.-15798 carries rates purporting to be in compliance with the Commission's order from Wise County to C. F. A. territory, but it is under suspension in this proceeding.

The exhibit shows on pages 2 and 3 thereof that the coke rates in effect on March 14th, the present rates, and what the rates would be under the full measure of the Column 3 scale prescribed in Docket 3511, from Birmingham and Chattanooga to all cities with a population of 25,000 and over, which are located in Illinois, Indiana, the lower peninsula of Michigan, and that part of Ohio on and west of the lines of the B. & O. from Cincinnati to Columbus, and the C. C. C. & St. L. Ry. from Columbus to Cleveland. The destination territory to the east or lying to the east of this line in Ohio is one that the by-product coking plants west of that line can seldom penetrate in effecting coke sales, by reason of the low prices brought on by beehive coke competition. There are immense fields of coal in Ohio and Pennsylvania, not only that, but there are big furnace plants located in the eastern half of Ohio that often market quantities of domestic coke, at prices that the average commercial coke producer could not begin to compete with.

[fol. 573] Sheets 4 and 5 of the exhibit include the present rates from Appalachia, in the Wise County District of Virginia to the same destination cities, and what the rates would be under the application of the I. & S. Docket 3511 Column 3 scale. The rates shown in certain instances are the suspended rates, they are the rates that would apply

under application of the full measure of the overhead scale. There are some rates shown that are under suspension. I haven't undertaken to designate those.

Sheets 4 and 5 also include rates in effect March 14, and 15, 1934 from Indianapolis to the same destination cities.

As an indication of the subnormality and irregularity of many of the present rates from the South to the North, which are readily apparent when these rates are compared with the I. & S. Docket 3511 Column 3 scale, we point to the present average rate per ton of $3.52 which applies from Chattanooga to the destinations shown in Ohio for an average distance of 459 miles. Application of the Column 3 scale to the same distances produces an average rate per ton of $3.92, which is 40 cents higher than the average of the present rates. The present Chattanooga rates to the Michigan destinations shown average $4.09 per ton for average distances of 621 miles, whereas the average rate for the distance involved is $4.61 under the application of the Column 3 scale, or 52 cents per ton higher.

In this connection the average of the present rates from Chattanooga to the Illinois destinations is $4.43 for an average distance of 564 miles. This average distance from Chattanooga to Michigan is 57 miles greater than the average distance from Chattanooga to Illinois; yet the average rate to Michigan is 34 cents less per ton than the average rate to Illinois. The $3.52 average rate from Chattanooga to the Ohio destinations is even lower in level than the I. & S. Docket 3511 Column 2 scale, which was prescribed by the Commission for application in C. F. A. territory, for by applying the Column 2 scale to the distances involved, the average rate would be $3.58, or 6 cents higher than the rates now in effect. The same is true of the Chattanooga to Michigan rates, for they at the present time average $4.09, and the C. F. A. territory scale average is [fol. 574] $4.19, or 10 cents higher for the same distance.

The Wise County, Virginia rates to Ohio and Michigan also are below the level of the Column 2 scale. The present rates to Ohio from Wise County average $3.24 per ton; whereas the C. F. A. Column 2 scale would average $3.39 per ton, or 15 cents higher. The $3.24 rate is 48 cents per ton less than the average rate that would apply under the overhead, Column 3 scale. The present Wise County rates to Michigan average $3.84 per ton, but the C. F. A. scale,

Column 2, would produce an average of $4.06 per ton, or 22 cents higher than the present rates. Attention is particularly directed to the Indianapolis rates, shown on sheets 4 and 5, which were increased an average of 1 cent to Ohio, 7 cents to Indiana, and 20 cents to Michigan under the general adjustment of Ma-ch 15, 1934. The summary at the foot of sheet 1 shows that the Birmingham rates to the 59 C. F. A. points in the exhibit average $4.65 per ton.

I want to make reference to the note that appears on sheet 9 of the exhibit which relates to the application of the Column 2 scale from Indianapolis. The rates from Indianapolis to five of the Illinois destinations shown on sheet 4 are lower than the full measure of the Column 2 scale. In other words, the present rates to Danville, Decatur, Moline, Quincy and Rock Island, Illinois are the same as those set out in the Column headed "Rate prior to March 15, 1934". That situation is prevalent by reason of the fact that the I. F. A. lines have not to date changed the adjustment from Indianapolis to I. F. A. points, where the distance measured by the short line formula prescribed in I. & S. Docket 3511 would change the rate, as compared with the formula that the Commission prescribed in I. C. C. Docket 16243, in which case they prescribed a scale which applied from Indianapolis to I. F. A. territory, and in Docket 3511 they prescribed a scale which applied from Indianapolis to the same territory, and changed the method of figuring the mileage. One scale was substantially the same as the other, and the general result taken as a whole, so little affected the carriers revenue that as I understand [fol. 575] it for the time being they felt that the expense incident to the refiguring all of the mileages to all of the destinations from all origin points and the expense incident to the publication of tariffs would not be justified. The net result is that some of those rates are under and some are over the I. & S. Column 2 scale. I mentioned the names of five in the exhibit that would be under the application, the rigid application of the Column 2 scale be increased. By the same token, the rates to Sterling, Kewanee, and Freeport, Illinois, would be decreased. They are not shown in my exhibit, because they are cities of less than 25,000 population.

Exhibit 75 is a comparison of the present rates on coke from Chattanooga, Tennessee and Birmingham, Alabama,

to C. F. A. territory destinations, rates prescribed in I. & S. Docket 3511 for the same movement, and for comparable distances within C. F. A. territory on the one hand with rates prescribed or approved by the Commission on a number of heavy loading commodities on the other hand.

Sheet 1 lists the commodities, cites decisions, indicates territorial application and basis for the rates, and shows the approximate values, average loading, per ton of 2000 pounds.

Sheet 2 compares the rates, ton mile and car mile earnings for movements of approximately 400 miles. Typical movements involving either an origin or destination mentioned by the Commission in the cases cited on sheet 1 are used on this sheet, as well as on sheets 3, 4 and 5.

For example, Item 6 shows a movement of paving stone, Knoxville, Tennessee to Lima, Ohio. Knoxville is shown as the shipping point in the stone case cited, and Lima is shown as the destination, because it provides a haul of approximately 400 miles. It is to be noted that the rates prescribed on coke from the South to C. F. A. territory as shown in Item 3 do not appear to be unreasonably high, or to result in excessive earnings, when compared with the rates on other commodities. It will also be noted the present rates on coke from Chattanooga to Dayton, $3.28 and from Birmingham to Jeffersonville, $2.93, are the lowest [fol. 576] rates shown on sheet 2, and that the earnings produced by these rates are considerably lower than those on any commodities shown.

Similar comparisons appear on sheets 3 to 5, for distances of approximately 500, 600 and 700 miles, respectively. [fol. 577] Exhibit 76 shows that the average delivered price on foundry coke at various important destinations in C. F. A. territory during 1933 was of sufficient amount to generally provide a net return for the Birmingham and Chattanooga ovens which exceeds their average return on foundry coke for the year 1933. The exhibit further shows these delivered prices would also generally afford a greater return than that for 1933 at the Birmingham and Chattanooga ovens under the application of the rates under suspension in this proceeding.

Sheet 2 is a statement of the delivered prices on foundry coke in effect on that article each month during 1933, at twenty seven destination cities in C. F. A. territory with

a population of 50,000 or more. The prices shown are those that were quoted by the Citizens Gas Company to customers at the points shown on the foundry coke, and formed the basis for invoices rendered by the Gas Company for the foundry coke sold at the majority of these points during 1933. Being delivered prices, the Gas Company's oven price was determined by deducting the freight rate from Indianapolis to the destination involved in a given transaction. These prices were established in most instances by competitors of the Citizens Gas Company and they were recognized by the Gas Company as the market on foundry coke at the points involved in accordance with the custom often followed by the Gas Company of meeting the market set up by its competitors.

Sheet 2 indicates that the average delivered price during 1933 on foundry coke sold at the six important Illinois destinations was $8.72 per ton. The grand average of the prices listed for all months, headed under January to December, both inclusive, is $8.68 per ton.

Sheet 3 shows the freight rates on coke that were in effect March 14th, the day immediately preceding the date on which the rate changes under the order in Docket 3511 were brought about, the present rates, which generally reflect the changes from March 15, 1934, and the rates which reflect the full measure of the scales prescribed in Docket [fol. 578] 3511 and related cases from Birmingham, Alabama, and Chattanooga, Tennessee, and Indianapolis, to the same destinations shown on sheet 2 of the exhibit. The rates in effect March 14, 1934 are generally the same as those in effect throughout the year 1933. The various sets of rates are averaged by sets.

Sheet 4 consists of summaries, and shows the average delivered price in 1933 for the Indiana destinations shown, that is $8.75 per ton, would, if observed in full measure by the Birmingham producers yield an average return to these producers of $4.62 under the average freight rate of $4.13 per ton, which was in effect during 1933, and up to an- including March 14, 1934, and an average yield of $4.68 per ton under the rates that became effective March 15, 1934, when the average freight rate to the Indiana points shown was reduced from $4.13 to $4.07 per ton; and an average yield of $4.67 per ton under the application of the full measure of the I. & S. Docket 3511 Column 3 scale to

the points involved, which scale produces an average freight rate of $4.08 to the Indiana destination.

At the base of sheet 4 the average f. o. b. oven selling price on the foundry coke sold by the Birmingham ovens during the year 1933 is shown as $3.12 per ton, which was obtained from the reports made by the Birmingham ovens to the Department of the Interior. The average figures are fairly representative of the foundry coke returns at Birmingham, Chattanooga and Indianapolis, because Birmingham and Chattanooga are the only foundry coke producing points in Alabama and Tennessee respectively, and the Indiana selling price average is within a few cents of the Indianapolis average price for 1933, which, was $6.33 per ton.

Sheet 4 also shows the average return to the Birmingham ovens at the points in each of the four states, using the overhead scale, I. & S. Docket 3511 Column 3 scale, rates applicable thereunder, in the calculation would be considerably greater than Birmingham's general average return [fol. 579] of $3.12 for 1933. The differences range from 74 cents on the Ohio points to $1.55 on the Indiana points. This shows that Birmingham would have that much to play on in marketing its foundry coke at the destinations shown. The grand average of all the delivered prices, $8.68 per ton, appearing at the foot of sheet 4, would under the application of the full measure of the Docket 3511 scales, produce a net return to Birmingham of $4.19, which is $1.07 greater than its general average return on foundry coke for 1933, and a net return to Chattanooga of $4.55, which is 5 cents greater than its average return for 1933, and a net return to Indianapolis of $6.35, which is 5 cents lower than the Indiana general average return for 1933.

Foundry coke is being produced in Central Territory at the present time in greatly limited quantities by reason of the fact that foundries as a general think are not operating on any appreciable schedule. When the gas demand forces the production of coke, and the market for the foundry coke is limited, the foundry coke necessarily must be crushed, and sold as domestic coke at a less average price, or at a less average return by far than the foundry coke yield, or placed in stock, which is an expensive proposition, by reason of the expense incident to reclamation thereof. The present situation with respect to the foundry coke market is forcing a greater production of domestic coke.

There is an overproduction of foundry coke in Central Territory, which has likewise forced an overproduction of domestic coke.

[fol. 580] The problems of marketing coke in Central territory are not any less difficult than the problems confronted by the Southern man. We are having a great many problems. I have prepared another exhibit with reference to density figures. This exhibits rebuts Mr. Ribe's Exhibit No. 71, which has to do with traffic conditions and operating conditions, to which density is closely related.

Mr. Norman: If we take all of these exhibits, we should have had a right to examine and rebut those exhibits. They should all have been offered on direct, and it is taking an unfair advantage of us to claim that they are rebuttal when they are not rebuttal in any proper sense, and come in here at this time and offer that, we have no opportunity at all to rebut—certainly no adequate opportunity.

Examiner McGrath: Your remarks are directed to the exhibits already discussed, are they?

Mr. Norman: I am directing it to them, and then as to this exhibit that he is now talking about, that they offered, nobody has offered any density of traffic figures here.

Mr. Doebber: The next exhibit, Mr. Examiner, also includes some cost figures.

Mr. Cronk: It seems to me that you can't just say because they don't touch densities that densities are not admissible when they touch operating conditions, which are intended to show that the rate could be justified on a lower basis than the suspended rate. When you open up that subject, you open it up for all purposes.

Mr. Norman: Then if you are going to open up on that subject we want to have an opportunity to go into it.

Examiner McGrath: Do you want to withdraw your exhibit No. 71?

Mr. Norman: Exhibit No. 71 has nothing to do with density of traffic.

Examiner McGrath: It has to do with relative costs of transportation.

[fol. 581] Mr. Norman: Yes, it does.

Mr. Cronk: And so does density of traffic.

Examiner McGrath: The examiner is disposed to receive this prof-erred document in evidence, to be numbered Exhibit No. 77, and he receives it with the understanding that

protestants will have an opportunity within fifteen days to compile from the same source that exhibit is compiled from, any data they may see fit of the same character, to show a complete picture of the situation as they see it. That should be done within fifteen days. That is satisfactory to you, is it, sir, Mr. Cronk?

Mr. Day: The Northern lines object to the ruling of the Examiner, particularly the stipulation for some extra-judicial presentation and acceptance of evidence by protestants after the close of this hearing. And in that connection, I call attention to the fact that like courtesy was not extended to the Northern lines when they suggested that it be granted them in connection with exhibits put in by protestants here during the hearing.

Examiner McGrath: Mr. Day, I think you wanted to make that general, and that was the reason it was objected to. If you would make your request specific,—your request was -ranted as to that study from which Exhibit 71 was compiled.

Mr. Day: No, I only made it as to the Government publications that were referred to in the exhibits offered by the protestants, and not generally.

Examiner McGrath: In order that it may be clear as to the information that the Examiner thinks should be admitted, or submitted, I will say that the same character of information, the exhibit should be limited to precisely the same character of information as is set forth on this prof--erred Exhibit No. 77 of Witness Doebber.

Mr. Day: The basis of defendants' objection is that will not accord to the respondents the fair hearing guaranteed [fol. 582] to them by the statutes, and will deprive them of their rights in the matter.

Examiner McGrath: The exhibit is received for all purposes, as rebuttal testimony, or as rebuttal evidence, with the stipulation indicated.

Mr. Widell: We wish to reserve an exception on that particular point.

Examiner McGrath: Yes, your exception is noted. If you don't see fit to file that within fifteen days, will you please advise the Commission and the parties that you have no desire to rebut it.

Exhibits Nos. 73 to 77, both inclusive, offered and received in evidence.

[fol. 583] On sheet 2 of Exhibit 73, the present rate from Chattanooga to Anderson should read $3.91, instead of $3.90, and the present rate from Chattanooga, to Springfield, Illinois, which is marked $4.15, should read $4.30. The percentage relationship shown in the right hand column should be 101, instead of 97, opposite the Chattanooga to Springfield rate. I am showing under the Column 3511 rate $4.25, because that is the rate for the short haul distance that we have set out in the Exhibit from Chattanooga to Springfield, Illinois. That happens to be the actual scale rate.

On Exhibit 76, sheet 3, the Chattanooga to Decatur, Illinois rate should read $4.30, that is, the present rate, instead of $4.15. The Chattanooga to Springfield rate, present, should read $4.30, instead of $4.15. The average in that column should be $4.32, instead of $4.27. On sheet 4, the Chattanooga to Illinois rates should read, as of March 15th, $4.32, instead of $4.27. The net oven price in the last column under that heading for Chattanooga to the right should read $4.40, instead of $4.45.

To Indiana, the coke rate from Chattanooga should be $3.71, instead of $3.69, and the rate should be $5.04. At the base of sheet 4, under the Chattanooga rates to all of the C. F. A. points, rates in effect March 15, 1934, under the figures there now reading $3.84 should be $3.86, and the figure opposite it, $4.84, should be $4.82.

The local coal rate from the Birmingham mines, that is, the mines from which the Birmingham producers draw their coal, as evidenced by their statements in I. & S. Docket 3511 is 79 cents per ton, and in certain instances, 89 cents per ton. The 89 cents represents the rate on coal from mines they draw their coal for coking purposes at their plant at Tarrant, Ala. I think those rates are intrastate rates, and imagine they are not on file with the Interstate Commerce Commission. That does not show the comparison between the coking in transit rates and the local rates.

[fol. 584] I have checked those rates from the tariffs. They are the L. & N. Railroad tariffs applying from the L. & N. mines in close proximity to the Birmingham District. I do not know the tariff number.

Mr. Norman: I call your attention to the fact that you sustained an objection to a question of mine to a witness about the allowances paid in the North. This certainly has

no more bearing upon the transportation costs of coke, the inbound coal rate has no more bearing on that, if as much, as does an allowance out of the coke rate itself.

Examiner McGrath: Haven't the witnesses generally in this proceeding referred to the inbound rates on coal from which the coke is produced? It seems to me that I recall a number of instances; Mr. Widell, for instance.

Mr. Norman: That is true, but I still submit there is not as much connection as between that and the allowance of the coke rate allowance which you did not permit me to show by a prior witness.

Mr. Keeler: Mr. Examiner, I think you are right in stating it has been shown in regard to other points, and Mr. Widell presented his statements which of course show a higher inbound cost on coal than exists in the Birmingham District. We are merely completing the picture, by showing the situation at Birmingham. As to counsel's statement that is has less relevancy than the allowance granted to some coke plants in the North, I take issue with that assertion, because in the North the allowances are made by order of the Commission, and direction of the Commission, and limited to the cost of the service. The Northern shippers get nothing in excess of the cost of the service, and they relieve the Northern carriers of a service they otherwise would perform.

[fol. 585] Examiner McGrath: We won't go into the merits of that at this time.

Mr. Norman: We did show, however, that we rendered the same service, and we got nothing for it, and they do.

Examiner McGrath: We have another problem, rates on coal inbound. Mr. Widell showed those, and as I recall, some other witness.

Mr. Widell: If the point of difference seems to be my Exhibit No. 41, showing the inbound coal rates to the coke producing points on that exhibit, together with the outbound coke rates, if what the witness wants to introduce is intended to rebut Exhibit No. 41, then I ask permission to withdraw Exhibit No. 41, because it is not material really to the case, as presented by us.

Examiner McGrath: The examiner's view is that the evidence as to the inbound rates on coal from which coke is produced may have some materiality, and will allow the

witness to give those rates, and the tariff authority therefor, in the Birmingham District.

[fol. 586] Cross-examination.

By Mr. Norman:

The Citizens Gas & Electric Company does not receive an allowance for terminal service at their plant out of the coke rates. It receives an allowance, but not out of the coke rates. The allowance is for the performance of an internal plant switching service that the Indianapolis lines provide without charge, and are willing to perform if we wish to have them do so. It is a spotting service, that they considered the shipper or receiver is entitled to under the line haul rate on a given commodity inbound, or a given commodity outbound with respect to our plant. It is a service that we perform to relieve them. We perform it at less cost than they can perform it, and under the Act they are empowered to that, and we are doing it, and being compensated for it. It applies per car, and is based upon a cost determined from month to month, and when the cost exceeds $1.65 per car, we get no more than $1.65, and when it averages less than the $1.65 per car we get paid whatever that amount might be. For instance, if it averages $1.30 per car, that is all we get paid for for that given month's service. We get that on each car of coal inbound, and each car of coke outbound. On Exhibit No. 73 it is not intended to set forth points to which there is a movement from the various producing districts shown. There is a movement from Indianapolis to Dayton, Ohio, and to Columbus, Ohio. Those points are east of Indianapolis, and whatever we ship to those points does not involve a back haul. We do not bring the coal from the east. We bring it from the southeast. I do not know whether the mines we bring our coal from is east or west of Columbus. Some of our coal moves through Cincinnati from the mines. I do not agree that there is a back haul movement involved in drawing coal from West Virginia to Indianapolis, Indiana, and shipping coke back to Columbus, Ohio. My exhibit shows the rates as being under the Docket 3511 scale, where they are from Indianapolis they are on the Column 2 scale, and where they are from [fol. 587] the other three origins indicated, they are on the Column 3 scale.

Q. Now, Mr. Doebber, you show on your Exhibit 76, an average selling price for foundry coke in Alabama in 1933 or $3.12. Do you know whether that is the selling price, or is the value, and includes the coke that is manufactured by subsidiaries or the company itself that uses it, and is valued by those companies?

A. I am relying, Mr. Norman, on the information conveyed in the United States Department of Interior Report, which indicates that that is an average of the foundry coke sold during that period. I couldn't determine anything else from that figure of "value" other than what the coke brought. In making our return to the Department of the Interior on the interrogation that comes from that department of that kind, we give them the selling price. We use some of our coke. We use breeze coke in our boilers. I do not know if we put any value on it in our reports to the Department of the Interior. This would be all foundry coke sold in Alabama, whether produced by steel mills as an adjunct to the steel manufacture, or whether produced by a commercial company such as the Alabama By-Products Company. It is not the practice of coke ovens that are operated in connection with furnace plants to produce foundry coke for commercial purposes, by reason of the fact that the structure of the coke that is ordinarily used in furnace practice is an open cell structure, and is not adapted to the metallurgical process or practice. The Sloss Sheffield Steel & Iron Company sells furnace coke, which they do not use themselves, but I — sure that is a fact. I have not heard of any steel companies that sell foundry coke that is produced, in addition to their own requirements. If that were true, it would be a rarity.

The density showing on Exhibit 77 is not really representative of our views as to a proper showing for this proceeding. We believe that the densities for all of the roads in the South should be compared with the densities for all of the roads in Central Freight Association territory, but we have [fol. 588] confined our density showing for the South to those roads who are parties to the rates, from the Birmingham District, from Chattanooga, and from the Wise County District, to destinations in the North, Central Freight Association territory, in particular. It has reference to the traffic handled here, in so far as we find in the I. C. C. statistical data, which shows that all of these roads handled

5,000 tons or more of coke during the year 1933, with the exception of the C. & N. & T. P., upon which your people relied so regligously in I. & S. Docket 3511 in your density showing. The G. M. & N. handled 4,500 tons, but the C. N. O. & T. P. handled 2738 tons. The balance of the Southern carriers shown handled 5,000 tons or more. The Southern Railways handles some of our coke in Central Freight Association territory, but it is very little. The G. M. & N. Railway*d* could handle coke moving from the South to the North, it is a party to the tariff naming rates from the Birmingham District. We included in the Northern roads all of the Class I carriers that handled coke during the year 1932 that operate within Central Freight Association territory. There are three roads that are now shown, the B. & L. E., the Montour, and Monongahela Railways. The Big Four is part of the New York Central. These are New York Central System figures that I have shown here. The Michigan Central is also included in the New York Central System and figures. These figures include the eastern district, as well as the Central Freight Association territory. This is true also of the Pennsylvania, B. & O. and Erie. It is also true of the C. & O., that it includes it-coal carrying roads. It includes the C. & O. because it servess a by-product coke plant located at Ashland, Kentucky, which ships extensively into Central Freight Association territory. It includes the N. & W. because it serves by-product coke plants at Ironton and Portsmouth, Ohio, which also ship coke extensively into C. F. A. territory. The lines of the N. & W. and C. & O. are classified as Pocahontas Region lines.

[fol. 589] Mr. Reynolds: Mr. Doebber, what objection have you to the coke producers at Chattanooga having the same rate mile for mile, that you have, and that your competitors in C. F. A. territory have?

Mr. Doebber: We believe that based upon transportation conditions, the rates from the South to the North should be on a higher level mile for mile than the rates with the Northern territory.

Mr. Reynolds: I don't think that answers my question. I asked you who do you object to the coke producers down at Chattanooga, for instance, having the same rate, mile for mile, that you have, and that your competitors in C. F. A. Territory have.

Mr. Holopeter: I think that is responsive to your question.

Mr. Doebber: I think it is responsive also, Mr. Reynolds, and supported by the further fact that rates, to be lawful, that is nondiscriminatory, nonprejudicial and nonpreferential should reflect transportation conditions as they are involved in the respective territories.

Mr. Reynolds: Well then, let me ask you this question. If your competitors in Eastern Ohio, and at Connellsville, Pennsylvania, have the same rate, mile for mile, that you do, how will it hurt if the Chattanooga producer is also given the same rate, mile for mile, that you have?

Mr. Doebber: I don't know whether it would hurt or not. But I go back to my original answer, which I think should govern, in order to place the various producers on a parity. In other words, I am unable to say just at this moment directly to your inquiry how much it would hurt, at, for instance, Columbus, Ohio, for Chattanooga to have the same rate, mile for mile, to Columbus, that Indianapolis has. I would have to give that some study, and perhaps give a later answer.

[fol. 590] Interstate Commerce Commission, Washington.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the transcript of the stenographer's notes of the hearing held September 11, 12, 13 and 14, 1934, at Louisville, Ky., before Examiner J. P. McGrath, and of exhibits filed at said hearing or in response to requests made at said hearing in Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, the originals of which are now on file and of record in the office of this Commission.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of October, A. D. 1936.

(Signed) George B. McGinty, Secretary of the Interstate Commerce Commission.

[fol. 591] It is my position that where one rate fully reflects transportation conditions it results in undue discrimination unless the other rate fully reflects transportation conditions. The column of rates headed I. & S. 3511

on my Exhibit 73 are prescribed rates. The rate of 370 cents from Chattanooga to Dayton is a prescribed rate. That is the rate for 392.3 miles, on a movement from the South to the North under the Column 3 -cale in that Docket. That rate was prescribed by the Commission. It is my understanding that the lawfulness of the rates from Chattanooga under Section 1 was in issue in Docket 3511 and cases joined therewith. I intended to reflect a prescribed rate from Chattanooga to Dayton. The Northern coke producers assailed the rates from Chattanooga to C. F. A. territory as unlawful rates in I. & S. Docket 3511, under Section 1. They were unreasonably low. I did attack the rates from Chattanooga under Section 3 of the Act. Our main assault went to Section 3. I do not know if it is a fact that the Chattanooga rates were not involved in the order and findings of the Commission in Docket I. & S. 3511. We meet plenty of competition in C. F. A. territory from producers within our territory. Our main competition does not come from producers within our own territory. Our competition is with all of them, Northern and Southern. I can't tell you whether it is any more severe with one than with another, without making some further study of it. At Ann Arbor, Michigan, for instance, we meet competition from all our competitors, Northern and Southern. I cannot segregate them. If our competitors in C. F. A. territory and in the South as those points listed in Exhibit No. 73 all entered those points on the same relative basis we would be on equal terms with them. That would give us equal treatment. That is, everybody would be — a relative basis, provided transportation conditions in their general aspects were adhered to. The figures shown on Exhibit 76, sheet 4, are the latest figures available according to the Department of Interior reports. I do not have a later figure myself. I am familiar with the sale of coke in C. F. A. terri-
[fol. 592] tory. The purpose of the exhibit is to compare like things. Now if I had taken the prices of today, and had compared them with the average return for 1933, I wouldn't have been comparing like things. So in order to compare like things, I took the prices for 1933, and the Department of the Interior figures for the year 1933. This reflects only the 1933 situation. It is the most up to date

showing I could make, based on the impartial report that is available.

Item 5 of Exhibit No. 75 portrays the rates for the distances that are set out on the remaining sheets of that exhibit, on the commodity involved, coal. On sheet 2 is the rate under the scale that was adopted in 200 I. C. C. 571 by the Commission for a distance of 400 miles on the commodity involved, on sheet 3 for a distance of 500 miles, and so on. I do not understand that that was intended for Southwide application throughout the South. I have this understanding regarding the extent of these rates that I show here, that the Coal Creek District, involved in this decision, is not far distant from Chattanooga, Tenn., and that for rates down into the Carolinas under this scale, we find that in some instances those rates are higher than your coke rates into the Carolinas. It is partially correct that those rates are really the rates for Carolina application from the origin mine groups in Tennessee, Virginia, and West Virginia, and so on. They do not have Southwide application in the South, but to the extent that you may have coke traffic from Chattanooga into the Carolinas, which is portrayed in exhibits offered in Docket 3511, that movement is analogous or comparable with the coal movement here involved.

With respect to the G. M. & N. Railway shown on Exhibit 77, I said that road is a party to the rates on coke from Birmingham to C. F. A. territory, according to the tariff publications on file with the Commission. That road could be an intermediate carrier on traffic to Illinois, St. Louis. I have not checked the tariff to see whether specific routes are provided by the G. M. & N. to those points, but [fol. 593] the fact that is is mentioned as a party carrier to the tariff is indicative of the fact that it could be made a party to a route. I agree that the coke tariff that I refer to and have in mind contains specific routing to specific destinations, and that concurrence of any line in the tariff itself does not mean that the rate will apply via any route, but only over specific routes, shown in the tariff, but I think the G. M. & N. could be used, or is used, as a party to some of those rates. I did not check the tariff to see if there are any specific routes provided via the C. M. & N. to C. F. A. territory, but a party in my office who did check the rates told me that the G. M. & N. is a party to some of those rates shown. The I. C. C. reference to that tariff

is I. C. C. 1797, issued by Agent E. L. Speiden. I do not know if the Union Pacific Railroad is a party to that tariff.

I appeared as a witness in I. & S. 3511. Mr. Williamson also appeared in the case. I offered testimony in support of the I. F. A. scale because it is somewhat our position that the C. F. A. scale, carriers proposed scale, was too high for long distance, and resulted in discrimination, or would result in discrimination against us in favor of the short haul shipper.

Mr. Ribe:

Q. I will hand you that exhibit, which is No. 104, and I want to ask you a few questions in connection with it.

Mr. Keeler: I think I am going to object to this class of interrogation of the witness. As I understand it, this goes to the rates within C. F. A. territory. Now there was a conflict between interests in C. F. A. territory as to what should be a proper scale within that territory. There were two distinct camps, you might say, and that issue was fought out very thoroughly, and evidence was presented by both sides. Now the Commission has determined that question, based on the evidence, and we have no question here with regard to that situation in this case. It has been determined by the Commission.

[fol. 594] Mr. Norman: If the Examiner please, the scale which is reflected in the suspended tariff is that scale, prescribed as a maximum scale in C. F. A. territory, to which generally speaking, the 10 per cent has been added.

Examiner McGrath: Well, it will be all right if counsel will direct his questions to the scale that is in issue here. But the examiner is inclined to agree with the objector's position; the level of the rates within C. F. A. territory is not in issue here in this proceeding.

Mr. Ribe: My question runs to the gradation of the scale.

Examiner McGrath: Neither the level nor the gradation. There is no question as to the propriety or the lawfulness?

Mr. Ribe: Rather as to the position of this witness, who in that case, with an average haul of 250 miles fights for a lower rate, who here, with 600 miles, wants to tack on something on our scale.

Examiner McGrath: Well, if that is the purpose, I will permit him to answer.

Mr. Keeler: I might say that Mr. Doebber and I were on opposite sides in that case. We put in a great deal of testimony to justify even a higher gradation than the Commission prescribed. Now we come in here, and our opponents are trying to get in some evidence that Mr. Doebber presented in that case with regard to an entirely different question. Now his testimony that they are putting in here went only to the gradation of the scale within C. F. A. territory. He took another position, and presented a great deal of evidence with regard to the rates from the South, where he contended higher levels of rates are justified. Now they are trying to take something that had to do only with those C. F. A. rates in determining that basis scale, to use against us here.

[fol. 595] Mr. Widell: It goes to the point of his Section 3 position. His obvious position here is that he would be unduly prejudiced, and Southern shippers unduly preferred, unless the Southern shippers are made to pay a high long haul scale, and himself a low short haul scale. The question goes to the point as to his Section 3 position in this proceeding.

Mr. Doebber: That is not the statement of my position.

Examiner McGrath: The question is directed, as I recall to the gradation of the C. F. A. Scale, versus the I. F. A. Scale. That question is not before us here.

Mr. Ribe: The question that I asked; and there has been so objection, and it has already been answered. My next question goes to rebutting Mr. Kern's statement that the haul within C. F. A. territory is 100 miles. I want to show Mr. Doebber's hauls are longer. Doesn't that exhibit, Mr. Doebber, show that your greatest movement was for distances between 200 and 220 miles.

Mr. Doebber: Yes. Our second greatest movement was between 260 and 280 miles, and the third greatest movement was from 240 to 260 miles. Our fifth greatest movement was from 320 to 340 miles.

Column 2 and 3 scales in Docket I. & S. 3511 are equally related for all distances, and carry approximately the same percentage for all distances.

[fol. 596] Redirect examination.

By Mr. Day:

Our position in I. & S. Docket 3511 was that the rates from the South to the North should reflect a scale set up by

the application of the scale prescribed by the Commission for application within C. F. A. territory, through from Birmingham for instance to C. F. A. territory, plussed by an arbitrary or differential equivalent to 20 per cent of that C. F. A. scale for the distance of the haul from say Birmingham to whatever Ohio River gateway was involved. It was a laminated scale we proposed there. We regarded as little as a difference of 10 per cent which the Commission fixed as being too small, based upon transportation conditions and the many decisions of the Commission, we felt that the proposal made by us was justified. The proposal was given after a good deal of study and consideration of the question of transportation conditions in the two territories.

We make shipments of coke to stations on the Southern Railway in Illinois and Indiana and also ship to stations in Illinois and Indiana in connection with the Louisville & Nashville Railroad, Illinois Central and Chicago & Eastern Illinois, and the various other railroads that elected not to concur in the revocation of the concurrences to the Southern lines.

Recross examination.

By Mr. Widell:

The position we took in I. & S. Docket 3511 and my investigation in regard thereto was directed to the rate levels on low grade commodities, generally speaking. It was not directed to the coke rate level within the South, because we think that has nothing to do with the overhead adjustment from the South to the North, and the Commission so stated in its decision in I. & S. Docket 3511. My position is harmonious with that of the Commission where they say in I. & S. Docket 3511 decision, and related cases, "Where we have prescribed inter-territorial rates that did not reflect this difference," meaning the difference in [fol. 597] transportation conditions,—"special circumstances surrounding the traffic accounted for the exception." Now there are no special circumstances in connection with the coke traffic from the South to the North that have been exhibited in connection with this record and would warrant anything like the low level that our Southern competitors are advocating.

I am acquainted with the brick level within the South after having read the decision of the Commission that per-

tained thereto, and which in substance points out that the level within that territory is a low one, and in fact so low that it cannot be reasonably used as a measuring stick to measure the rates on brick in other territories or inter-territorially. I know there are some commodities in the North that are rated lower than they are in the South. I think it is reasonable and fair to observe an overhead level of rates higher than within either of the territories from and to which such rates apply. I give the reason because I agree with the Commission as to what it has done in like cases. I do know of decisions or instances where the overhead rates from the South to the North are higher than the level in either the South or the North. The decision involving the rates on paving stone, 200 I. C. C. 65, the decision involving the rates on salt, 197 I. C. C. 115, the decision involving cement, 192 I. C. C. 176. I do not know of any case in which the Commission has prescribed an inter-territorial scale that was higher than the rate level prevailing in both of the territories between which the scale applied.

[fol. 598] JOHN B. KEELER, testified on direct examination on behalf of the Northern Respondents as follows:

I am Assistant Traffic Manager of the Koppers Company and its various subsidiaries and affiliated companies, of which the Hamilton Coke & Iron Company is one.

There has been reference made in this case to certain rates within central territory that have been made to meet truck competition, and the suggestion has been made by witnesses for the Southern operators that these rates in some way militate against them.

Reference has also been made to the fact that for the very short hauls the rates which the Ohio Commission prescribed for application in Ohio are slightly below the interstate scale. In view of the suggestion that has been made with regard to these short haul rates in Ohio, which are in some instances below the scale, and which have been made to meet competitive truck conditions, at least in so far as the rates which the carriers themselves have prescribed, I have had prepared a statement showing the truck situation as it exists from our Hamilton plant.

I have tried to get a representative picture here, and have a statement covering 36 destinations, which I believe are

all within a radius of fifty or sixty miles of Hamilton, certainly not over sixty miles, and I believe practically all of them are within fifty miles. And to get a whole year, I had to go back to the fuel year April 1, 1933 to March 31, 1934. During that period there was trucked to these 36 destinations from Hamilton 84,331 tons of coke, as contrasted with a rail movement of 72,068 tons.

I offer that to show the intensely competitive situation which exists in Ohio, as between the trucks and the rail carriers, and I can not see that in any case where rates have been made lower than the scale in order to enable the rail carriers to handle the traffic in competition with the trucks that *that* in any way militates against our competitors, for [fol. 599] if those rates were not made, the traffic would move by truck, and our Southern competitors would have the same transportation costs, or probably lower transportation costs to meet, because I think most of the Northern producers try to give their business to the railroads, and in a great many instances there is a material volume that moves by rail where it could be moved cheaper by truck; but where the differential gets too great, the trucks are utilized. I repeat that I don't see how the maintenance of these truck rates where they have been established can in any way militate against our Southern friends. Some interrogation of the witnesses has been made for the Indianapolis plant with regard to allowances at that plant. I want to say that at Hamilton, we get no allowance at that point.

Cross-examination.

By Mr. Norman:

I can't agree that the truck competition affects the ability of the long haul producer where the truck competition is not between his point and the consuming point, affects his ability to compete just as much as it does the short haul competitor. I think the railroads are presented with a very practical situation. If every time they made a truck competitive rate they had to haul down their rates from any other point to that particular point, their rate structures would be torn all to pieces in short order. I think there is a distinct difference in circumstances which confront the railroads in these cases. In the case of the truck competition, if the railroad kept its rates up to the scale in all cases, failed to meet that, the business would all move by truck, and

I think that the situation from a competitive standpoint is even worse there than where the railroads meet the rate, because when the railroads put in a rate that will carry the traffic at somewhere near the truck costs, the competitor knows what that cost is going to be. If it is left to the trucks, he never knows what that cost is going to be; it may be [fol. 600] one thing one day, and something else another day. So I think the situation does not certainly hurt the competitor any. It is a fact that the competitor to whom trucks are not available has to meet the competition at the destination with truck transportation costs, just the same as the competitor to whom trucks may deliver, but I will say we have a great many places where we ship commodities, where truck competitive rates have been put in by the railroads, and I have never felt that we were justified in asking any reduction in our rates where the railroads meet a short haul competitive rate. I have not asked for any reductions in our rates to such points, and I don't think that it would be fair to ask for them.

Mr. Norman:

Q. Although by reducing the long haul rate, the railroad might get a long haul; whereas, by reducing the short haul rate, it may or may not get the business from the trucks?

A. I think from a practical standpoint, it just can't be done. I don't think it can be done.

Q. The difference is, from the railroads' standpoint, as to whether you can see the traffic being handled by somebody else, or whether the traffic is just drying up?

A. Well, I can't agree with you on that Mr. Norman. I say we have not ever advocated any such principle, and we are concerned with that very same question in many places. This truck competition would not necessarily tend to localize all traffic. The Southern people have been shipping into Central territory a very substantial volume of coke, which indicates that they are still able to meet the situation. I couldn't tell you what percentage of the coke consumed in C. F. A. territory is shipped from the South. I do not know if it is less than 5 per cent.

[fol. 601] Cross-examination.

By Mr. Mohr:

I agree with the principle that the Northern lines should be permitted to establish competitive rates where there is

a local truck competition. I think they are justified in doing it. The establishment of rates from the South to the North is a matter of mutual agreement between the Northern lines and the Southern lines. I have heard a great deal here about the Southern lines being taken, or having taken away from them their managerial discretion. As I understand it, there is the same managerial discretion in the Northern lines as in the Southern lines, with regard to the establishment of joint rates. The Northern lines have not seen fit to join in reduced rates, and I understand that the Commission has no power to force a carrier to meet truck competition. If the Northern lines had agreed to participate with the Southern lines in the establishment of competitive rates, we might have had cause for complaint. I don't know as to that; that is not the situation that is confronting us. We are testing the lawfulness of these rates under suspension. My position is that the addition to the level in the North is because of differences in transportation conditions within the South. I think there is a very marked difference in transportation conditions. If the Commission had provided the same level of rates through from the South to the North and then provided for arbitraries to take care of that difference in the transportation conditions, and prescribed them as reasonable maximum, it would depend upon what form the order of the Commission took whether the Southern carriers, without any participation by the Northern carriers, could have foregone those arbitraries. If the Commission prescribed those rates with arbitraries from the South, the carriers would have had to adhere to them. You would have to determine what kind of order the Commission entered, as to whether or not the Southern carriers could waive their arbitraries.

[fol. 602] Mr. Mohr: Do you feel that you are injured by reason of the rates that are maintained and continued in effect by the Illinois Central Railroad, from the Birmingham District to Chicago, we will say, that are lower than the Column 3 scale of rates?

Mr. Keeler: Well, we do not ship a great deal of tonnage into Chicago and that territory. We have at times, but I would say that that was rare, and an unusual movement. We do not have that competition open.

Mr. Widell: Mr. Keeler, do you know as to the distribution of the transportation burden as affecting commodities

in the South and in the North, whether or not coke takes the same position in both territories?

Mr. Keeler: I hesitate to enter into a long discussion with Mr. Widell. On the theories of rate-making. I have given certain testimony here with regard to the truck situation in Ohio. Now I am quite certain that Mr. Widell and myself would not reach an agreement on this points if we argued it for an hour. My testimony dealt with the truck situation in Ohio.

[fol. 603] Roy S. Kern, recalled as a witness for the Northern Respondents testified:

Direct examination.

By Mr. Day:

Exhibit 78, consisting of two pages, shows a number of important rates on coke within central freight association territory which were reduced as a result of the revision in I. & S. Docket 3511, effective March 15, 1934. These rates are in the main very important from the standpoint of moving tonnage. Attention is called to one rate which probably should not be on the exhibit, that is from Painesville to Cleveland. The correct rate is shown there as taken from the scale in I. & S. Docket 3511, the rate-making distance being 29 miles, but the Ohio Commission prescribed a scale, making a rate of $1.00. It is to be observed that the southern Ohio rate to Detroit appears on this exhibit, having been increased on March 15, 1934, by 16 cents per ton. There is a huge movement of coke from the southern Ohio district to Detroit, and the increased rate applies on all of it.

Exhibit 79, compares the relationship of the I. & S. 3511 Column 2, coke scale with the official territory first class rate scale as prescribed in Docket 15879, and the column 3 interterritorial coke scale with the southern territory first class scale as prescribed in Appendix K-2 of Docket 13494. I desire to make the comment that the C. F. A. coke scale averages 16.6 per cent of the C. F. A. first class scale which applies all over official territory. The comparison here begins with 300 miles merely because that is the beginning or approximately the beginning of the interterritorial rates from the south to the north. In other

words, Chattanooga is slightly over 300 miles, via the short line to the Ohio River.

Exhibit 80 is a comparison of a number of through first-class rates from Birmingham and Chattanooga to large and typical destinations north of the Ohio River, and the percentage which the Column 3, Appendix 8, I. & S. 3511 rates, which are either the present rates or those under sus- [fol. 604] pension in this proceeding, bears to the through first-class rates. In the instance of Birmingham, the coke rates interterritorially average 13.06 per cent of the first class rates, and in the instance of Chattanooga, the coke rates bear 13.15 per cent of the first class rates. In connection with the prior exhibits, mention was made of the fact that the average percentage relationship of the C. F. A. scale to the C. F. A. first class was 16.6 per cent.

In Exhibit 8, introduced by Mr. Behring, there is shown a number of commodities, and the interterritorial rates applying from the south to the north, and compares the car mile earnings under those commodities that would result with that which would be reflected by the interterritorial coke scale. All of these commodities interterritorially take percentages of the first-class interterritorial rates. In the instance of paper stock, the exhibit shows 30 per cent, but the decision it refers to, I. & S. 3480, shows 20 per cent, and I believe the rates under that caption are 20 per cent of first class. On paper stock within C. F. A. territory, the same decision, on page 603, shows that the commodity is rated 24½ per cent of first class, and that there are numerous instances within the territory where the rates for important movements are substantially lower than the classification basis.

The exhibit also shows rates on charcoal, which are 22½ per cent of the interterritorial first-class scale. Within C. F. A. territory, the rate level is 6th class, or 27½ per cent of first class. Here again the Commission indicates that there are many lower commodity rates within C. F. A. territory. In this case, I might mention, or it might be well to mention that there was also a conflict between the southern carriers and the northern carriers. The southern carriers as in this proceeding wanted something lower than reasonable maximum rates as prescribed, but the Commission decided that the level advocated by the north was the proper level.

In the instance of hay, the rates interterritorially are 25 per cent of first class, and within official territory, they [fol. 605] are 5th class, or 35 per cent of first class. These classification ratings in official territory are cited merely for the purpose of showing the similarity in the relationships as reflected by the interterritorial and C. F. A. coke scales to the relative class rate adjustments interritorially and within the north. In the instance of Cullet, the exhibit shows an average weight per car of 59,600 pounds, which is an average of two average weights contained in the decision, the higher of those two being 66,212 pounds.

Witness Behring's Exhibit 7 purports to show rates prescribed by the Commission first in Docket 25059, from Margerum, Alabama, to official territory on processed asphaltic limestone. Although the exhibit sets forth some of the statements made by the Commission in that decision, it fails to point out that the Commission in Interstate Amiesite Company v. A. C. & Y., 173 I. C. C. 456, prescribed a distance scale of rates for crushed stone or slag, coated with oil, asphaltic tar, and so forth, in carloads from Shaw Junction, Pa., to Youngstown, Ohio, to destinations in New York, Ohio, Pennsylvania and West Virginia, for distances up to 250 miles, hereinafter called the Northern Amiesite Scale. Rates under the scale are lower than those under the southern, the rates thereunder for 416 miles, the distance from Margerum to Springfield, for example, being 219 and 280 respectively.

Subsequently, in the decision they also point out that the southern interests advocated the northern scale, of the application of the southern scale through to the north, and the decision states: "As already indicated, this basis would produce lower rates on the processed material than on the natural."

Shaw Junction is in the Youngstown area and attention is called to the finding of the Commission, that rates on amiesite were prescribed in consideration of a value of six dollars per ton, but Mr. Behring fails to note that on asphaltic limestone, the value as found by the Commission [fol. 606] was $3.00, and in the case there are references to lower valuations on the commodity. These commodities are properly comparable in any sense with coke. They are road building materials, and everybody knows that road building materials take the very lowest level of rates known

to freight traffic. In our territory they are related to a great extent to slag, the original basis for which was made for the purpose of getting rid of it. Road building material is crushed stone, gravel, sand and slag, and it is to be found almost everywhere, and if the traffic is to move either within the north or within the south or any way, it has to move on extremely low rates.

Mention is made on the exhibit that rates on some of these commodities are lower in the south than they are in the north. That may or may not be true, as one sizes the individual situation up, but I believe I can match any low rate in the south with one equally low in the north, and perhaps lower. We have rates in our own district which run as low as 40 cents per ton on road building material, generally, and made by the Pittsburgh, Mahoning, and Shenandoah Committee of which I am chairman.

Exhibit 81 is a statement consisting of three pages, which compares traffic densities within the southern region and within central freight association territory.

In the southern region during 1932, as a whole, the carriers handled 676,583 carloads, or 34,462,966 tons of bituminous coal. They terminated 415,018 carloads, or 21,321,021 tons. Coke originated was 15,960 carloads, or 550,436 tons; terminated, 14,457 cars or 498,663 tons; total 26,598 cars, or 887,822 tons. The Louisville & Nashville Railroad, originated and terminated 4,356,359 tons of bituminous coal. There is a different separation in this report. The figure given was originating on respondent's line, and terminating on respondent's line, that is 4,356,359 tons. Now that originating on respondent's line, delivered to connecting lines, was 13,231,720 tons; received from connecting lines, [fol. 607] terminating on respondent's line, 214,456 tons; delivered to connecting lines 239,891 tons; total tons carried 18,042,426. Coke originating on the L. & N. and terminating on connections, 163,234 tons; received from connecting lines, terminating on connections, 201,728 tons; received from connecting lines, terminating on the L. & N. 20,531 tons; delivered to connecting lines 3893 tons; total tonnage, 389,386.

The witness called attention to Widell's exhibit 39, in which there is shown mileages and rates on coal from Group 2 mines on the C. N. O. & T. P. Railway. The question arose here as to the volume of tonnage handled on those rates.

I want to say that that volume is very negligible. The Southern Railway reports tonnages to me as Chairman of the Ohio Bureau of Coal Statistics, and I compile them for the benefit of the railroads. The Southern Railway pays no portion of the cost of maintaining that bureau solely on the ground its tonnages are so insignificant that it is not worth while. They have repeatedly stated that. Furthermore, these rates are in no sense representative of northbound coal rates. They are a part of the crossing adjustment, and they are the extreme part, meaning the origin districts which lie furthest away from central freight association territory.

In certain of Mr. Ribe's exhibits, he has undertaken to show by production figures published by the Bureau of Mines, Department of the Interior that the southern producers of coke suffered worse than those in the North during the depression. He has chosen the years 1929 to 1933 for his purpose. I would like to state in the record that, taking 1929 as the base, when 4,867,252 tons of coke were produced in by-product ovens in Alabama and Tennessee, the corresponding figure for 1932 was 30.3 per cent of 1,473,126 tons.

Taking the combined showing of all by-product coke produced in the states of Illinois, Indiana, Michigan, Ohio and Pennsylvania, we find that there were 36,389,880 tons produced in 1929, and in 1932, there were 11,413,344, or 31.3 [fol. 608] per cent of 1929 in 1932. In 1933 the production of coke in the North rose somewhat more than in the South, due to the cond-tions of the steel industry in the North. In 1932, the steel industry in the North was a- near flat as ever in its history. In 1933 there was a substantial increase, which necessitated the production of a great deal more furnace coke than in the preceding year. As illustrative of the better steel business in 1933 than in 1932, I know of no better way of showing it than by the fact that ex-lake iron ore movement in 1933 was 600 per cent more than in 1932. Furnace coke enters into the iron and steel production, the type used in blast furnaces principally, and that coke within our territory is made practically exclusively by the steel manufacturer, and does not enter into the commercial conditions at all.

Mr. Ribe's Exhibit 64 shows a basis of rates which he states was approved by the Coal, Coke and Iron Ore Com-

mittee on February 5, 1925. I want to state in connection with this merely that at the very next meeting, which was two weeks after that referred to, the action of the committee was changed. In other words, the committee recanted, and there was no subsequent affirmative action, nor were there any rates published during the brief interval, when we had a fallacious record. The reason that no rates were published was that when the southern roads went to the individual northern roads for specific concurrences, they didn't get anywhere. When new rates are being established, general concurrences are not as a rule observed, unless for some specific or special reasons a line or a set of lines wants to force upon another set of lines rates with which they do not agree. Specific rates are usually initiated individually, and without regard to standing concurrences.

Mr. Ribe this morning recalled to my mind something I said about the average movement of coke within C. F. A. territory, and I merely want to point out as part of my authority the fact that the Commission in I. & S. Docket 3511 at page 6464, said: "Probably 60 per cent of the line [fol. 609] hauls between points in Central Territory are under 150 miles in length." I think that the average distances are considerably less than that.

With respect to truck rates, that have been talked about so much, I want to state that it is the policy of the Northern lines, as exercised in all of the instances where truck competition or truck competitive rates rather have been published on not only coke, but coal and other commodities with which I am familiar, never do meet the truck rate as portrayed to them. For example, I mentioned on direct examination an eighty cent truck rate from Massillon to Barber. We had before the committee when that rate was approved, very convincing evidence in the shape of an analysis which was made by the General Motors Corporation, indicating that the trucking cost on that traffic could not exceed 50 cents per ton. We made the rate 80 cents per ton. That is the policy of the C. F. A. carriers, and I believe the carriers everywhere, so that it is a fact that when we publish a truck competitive rate, we are not changing the competitive situation one iota. In fact, it is costing the shippers money to use that rate, and the only reason they use it so far as I know is the fact that their plants

are constructed fundamentally for rail service, and they prefer that, even in instances where higher freight charges result. It is only our purpose in meeting truck competition to get near enough to the truck rate where transportation conditions and plant locations are such that they will favor us with the business. We retain some control over those truck compelled rates by publishing expiration dates in our tariffs.

In this hearing we have heard a lot about rates on coke within the South, North and everywhere except from the South to western trunk line territory. I want to call attention to the fact that in the decision in I. & S. 3511, there was a case disposed of involving rates on coke from Birmingham to Omaha, a short line distance of 890 miles. The rate assailed was $6.01 per ton, and the Commission approved that rate. The interterritorial scale 3 rate for 890 miles makes a rate of $5.50, which is 51 cents per ton less [fol. 610] than the maximum rate approved in that proceeding. I am also familiar with a number of other rates on coke from the South to the western trunk line territory, particularly the Twin Cities, that rate having been before our committee within the last few months, and the approved basis was somewhat in excess of the Scale 3 rate.

Exhibits 78 to 81 inclusive, offered and received in evidence. Report of the Commission in I. & S. 3511, reported in 194 I. C. C. 640 offered and received in evidence as Exhibit No. 82.

Cross-examination.

By Mr. Norman:

The carriers also make rates to meet water competition. They meet destination competition and various kinds of competition at times in making rates. There is the element of carrier competition, but that in the instance of a mileage scale is negligible. We adhere to the mileage scale, which automatically fixes the competition. We do not make rates lower than reasonable maximum where there is a reasonable maximum mileage scale which the carriers are adhering to. We make competitive rates to meet competition other than truck and water competition where there is no reasonable maximum scale which the carriers are adhering to. The figures I gave about the production of coke in various districts, I made no separation as between what can be called

captive coke, that is, coke consumed by the same interests that produce it and commercial coke, that is, coke which is sold.

In reference to the inner crescent coal rates, I will say that in the beginning we had the Pittsburgh District rates. The C. & O. Railway and the N. & W. Railway made those rates from competing districts, and the Louisville & Nashville made rates to meet those rates of the C. & O. to the L. & N. points, and the L. & N. Railroad always has insisted that their rates are not their own, they are merely made to fit the C. & O. situation. The C. F. A. lines participate in rates made the same, and have not undertaken to require the reflection of any alleged difference in transportation conditions from the South on coal, much to the chagrin [fol. 611] of the C. F. A. shippers and a good many of the C. F. A. carriers.

Cross-examination.

By Mr. Widell:

Exhibit 81 was intended to prove what Mr. Kerr said was right. It was my understanding he said that transportation conditions in the South are more difficult than in the North.

Where interterritorial rate levels are recognized my answer is yes, that the rates on coal, coke and iron ore from the South to the North should be higher than within the North. In coal rates we don't recognize north and south or east and west, and to my knowledge we never have. Now the southern railways and the southern shippers should certainly be thankful for that situation.

The respect in which the situation is different with coal than with coke from the South to the North is that the Pocahontas lines are the biggest northbound coal handling carriers. They extend into the State of Kentucky and abut on Southern territory. The Louisville & Nashville Railroad is right across the hills from the Norfolk & Western, and the C. & O., and consequently they are producing the same coals out of the same seams, and they have a comparable volume of traffic on that coal, and under all of those theories, the division between North and South was eliminated. I believe that if the Northern lines wanted to take the same

position on coal as they do on coke, our rate picture would be nothing like what it is today. We are not willing to extend the same consideration to Southern coke as we extend to Southern coal. I have never heard the South say that by not conceding anything they didn't have to concede in the instance of coal the South was at all hurt. I have been in so many coal cases, and I have listened to so many of Mr. Van Norman's commercial witnesses and other commercial witnesses, that frankly I do not know if there is a distinct difference in the quality of the coal produced at various districts in the territory.

[fol. 612] There is a difference in the B. T. U. value of crescent coals as compared with central western coals, Indiana, and Western Kentucky. I think that the crescent coals are not at all similar, and to a large extent, and for many purposes not competitive with coals originating in either Illinois, Indiana or Ohio. As to coke produced in the territory in what is known as the crescent usually being of the same quality as that produced in Indiana, and Illinois, and in Birmingham, I am not a chemist. I have burned a lot of different kinds of coke, and to me coke is coke.

Q. The crescent coal too is the notable instance wherein you are maintaining the same level of coal rates from the South to the North as apply within the North, is it not? That is about the only instance where that occurs, isn't it?

A. That is really not an exception, because of the continuous chain of coal producing groups; it just happens to cross a line dividing rate territories as described or created by the Commission.

Q. That was the point I wanted to develop, that the crescent, where that situation occurs, has a uniform quality of coal, and rather definitely or distinctly different from the coals produced elsewhere in the territory.

A. An example of that is right parallel with coal and coke. Wise County is in Southern territory. Rates from nearby coal mines on the Louisville & Nashville take the crescent basis of rates, and under Ex Parte 74, the Official territory figures, the Official territory increase was granted. But on coke, the Louisville & Nashville Railroad, however, insisted that that was Southern territory, and the inter-territorial advance was accorded it.

[fol. 613] We do not have the same situation with coke as we have on coal with respect to the location of production.

There is a coke plant at Ashland, Kentucky. It is a large plant as commercial plants go, but not as steel plants go.

[fol. 614] Cross-examination.

By Mr. Norman:

None of the coke rates from points on the C. & O. and Norfolk & Western Railroad to C. F. A. territory have been revised on the Scale 2 basis. They are considering it now and it is going to cut them off. The shipping points are in the New River Coal District on the C. & O., Pocahontas Coal District on the N. & W., and the Kanawha District on the Illinois Central, O. K. & M.

Redirect examination.

By Mr. Day:

The rate on bituminous coal from the Southern Ohio District to Toledo is $1.89; the average distance is 220 miles, and that represents substantially the group average distance from which the $1.89 rate applies to Toledo.

[fol. 615] A. J. Ribe, recalled as a witness, testified as follows:

Direct-examination.

By Mr. Norman:

On the subject of coal used for coking in the Birmingham District, I would like to state that I made a study of our performance in the Birmingham District during the year 1929. I think that study is representative of the situation today, except for the decrease in the amount of coal consumed. In 1929 we used, in round figures, 6,700,000 tons of coal for coking, and of that tonnage, 1,050,000 tons moved by a common carrier railroad, on which transportation charges were paid. Of that railroad movement, the weighted average haul on the Alabama coal was 33.4 miles, and the average rate paid was 47.7 cents per net ton of 2,000 pounds. The ovens in Alabama are figuratively speaking, right at the mines. There are some hauls over the private railroads of the operating companies, but there

is no transportation charge paid to anyone else on that coal. The transportation charge is paid by the Alabama By-Product Corporation on its coal. The regular commercial rates range from 79 to 89 cents, the preponderance of the movement would be from the points where the 79 cent rate applies.

The Alabama By-Products Corporation performs the service of pulling a car off of the interchange track of the trunk line carrier and spotting it for unloading and moving the empty back to the trunk line carriers. They perform the same service on the outbound coke. They do not receive any allowance out of the through rate.

In connection with the rate exhibits presented by witnesses Hollopeter, Doebber and Kern, showing point to point rates within Central territory, I would like to offer in rebuttal my Exhibit 83 which shows a more complete picture by the use of one origin, namely, Ashland, Ky., and the use of Ashland, Ky., is representative of the two other points in the Southern Ohio group, namely Portsmouth and Ironton, Ohio.

For the purpose of this exhibit, I have used the same eighty-three consuming points in central territory that Mr. [fol. 616] Kern's committee used as representative throughout four or five years of negotiations on these coke rates. This statement was prepared shortly after the decision in I. & S. Docket 3511 came out, and is based on the distances as I checked them, and rates, under the Column 2 scale. I have not checked these rates against the tariff. It will be noted that under the column headed "Present Rates," which refers to the situation prior to March 15, 1934, rather than to today, there were seven points in Illinois to which Ashland had no joint rates. On page 2, it will be noted by excluding these seven points in Illinois, that Ashland received under the Column 2 scale, an average reduction of 24.3 cents per net ton.

In rebuttal of Mr. Doebber's Exhibit 77, also Mr. Kern's Exhibit 81, I would like to say that as I understood Mr. Doebber, the theory of his Exhibit 77 was to compare the traffic density over the routes from the Southern coke ovens to the Ohio River, with the density within the central freight association territory. I agree with that theory, for reasons that I will later state.

In addition, however, I want to point out the extent to which Exhibit 77 distorts the situation. Concerning the

use of the routes from the Southern ovens to the Ohio River on coke moving to Central territory, none of this coke moves over the low density routes in Mississippi, Eastern Louisiana, Central and Southern Alabama, the State of Florida, Georgia or the Carolinas. Roughly stated, a movement from Chattanooga up to the Ohio River is one-half in the State of Tennessee, and one-half in the State of Kentucky. From Alabama, the movement is one-third through Northern Alabama, one-third through Tennessee, and one-third through Kentucky.

In Central territory, on the intraterritorial traffic, the movement extends over the length and breadth of that territory for the reason that there are ovens around the borders of that territory at points such as Buffalo, New York, Pittsburgh, Pennsylvania District, Southern Ohio, Marion, Ohio, Granite City, and Chicago, Illinois, Milwaukee, Wis-
[fol. 617] consin, with plants in between those borders, at points such as Terre Haute, Indianapolis, and Detroit.

Mr. Doebber, in his Exhibit 77, has used nine southern railroads as representing those with routes to the Ohio River. Concerning the G. M. & N., technically under the tariff that may be a route, but my Exhibit 70 shows that in 1932 the G. M. & N. originated no tonnage of coke, and carried only 4500 tons. Except for a few cars, that movement, covered a cargo of coke from the Birmingham District to Mobile for transhipment by water, which moved over the Frisco, the G. M. & N. Railroad.

Concerning Mr. Doebber's use of the Southern Railway, as I stated previously, that carrier has no natural route from either Birmingham or Chattanooga to the Ohio River. Therefore, in this exhibit, if the Southern Railway belongs anywhere, it would belong with the Central territory lines, because of its reaching the Granite City, St. Louis District, where coke is produced, and substantial consuming points for coke in Indiana and Illinois.

The exhibit also uses the line of the Frisco. That carrier operates west from Birmingham to Memphis through that gateway to the Southwest, and western trunk line territory. It also has a route west of Memphis, through Southwestern territory to St. Louis, and probably handles some traffic in the western portion of I. F. A. territory, which destinations are not here involved.

That is the distortion of the use of the Southern Lines. The distortion of the use of the Central territory lines oc-

curs by the use of the B. & O., the C. & O., Erie, N. & W., N. Y. C., and P. R. R., which figures of necessity include their high density lines east of Central territory. But even with those distortions, both north and south, after having eliminated the figures from the G. M. & N., Southern Railway and Frisco, but leaving off the central freight association territory lines, that Mr. Doebber used in there, I find that the average revenue per net ton per mile is 9.18 on the southern roads and 9.27 mills on the northern roads, or a rate for the southern roads less than the central ter-
[fol. 618] ritory roads, instead of an increase of 11.4 per cent, as Mr. Doebber shows.

Concerning the expense per net ton mile, the revised figure would be 6.35 mills in the South, 6.07 mills in the North, or a difference of 4.6 per cent, instead of 24.3 per cent.

Another distortion of Exhibit 77 by the use of these Southern lines, with the exception of the C. N. O. & T. P. Railway is that of course by using the System figures on lines like the Louisville & Nashville, the Illinois Central, the low density lines in Mississippi, Central and Southern Alabama, Florida, and so forth, are included.

I know of no way to compare accurately the density on the routes from Chattanooga and Birmingham to the Ohio River with that in central territory, because there is not available to me the divisional figures. However, I. C. C. statement, 28 I. C. C. 105 shows densities by states for the year 1927. This traffic from the Southern ovens moves over the main arteries of the lines reaching the Ohio River, over which all traffic between the South and the Central West and Northwest, via the Ohio River is handled. This fact, for example, plus the coal traffic, accounts for the fact that in 1927 the density in the State of Kentucky, per mile of main track operated, was the figure 3,716,685 tons per mile, or in excess of the densities for Ohio, Indiana, Michigan, Illinois and Wisconsin. It further accounts for the fact that during the same year the density in Tennessee, which was 1,630,458 tons, was in excess of that for Wisconsin and Michigan north of Zone A, and practically the same as that in the State of Illinois.

On the question of average haul within central territory, I do not dispute Mr. Kern's evidence as to what that average haul is; but I want to point out that it includes the captive tonnage of the steel plants, which is a huge tonnage;

but when you eliminate that and go to the commercial tonnage, that is coke produced and sold in the open markets, we find a different picture.

For example, in Mr. Hollopeter's Exhibit 120, filed in Docket 3511, he showed that 9.5 per cent of his tonnage [fol. 619] moved for distance between 50 and 100 miles, 24.3 per cent between 100 and 200 miles, 38 per cent between 200 and 300 miles, 14.2 per cent between 300 and 400 miles, 3.3 per cent between 400 and 500 miles, and 10.7 per cent over 500 miles.

The Louisville & Nashville Railroad handles the greater portion of the tonnage from the Birmingham District to central freight association destinations. In 1929, and excluding the approximately 35,000 tons that I didn't have before me at that time, eighty-six and two-thirds per cent of the remainder moved over the Louisville & Nashville.

Cross-examination.

By Mr. Day:

The density figure for Tennessee per mile of road is 1,630,000 tons and Alabama, 1,152,525 tons. This would include all of the states through which the Alabama coke moves, and excluding Alabama it would include the state through which the Tennessee coke moves. The reason the Kentucky figure of three and a half million tons per mile of track is as high as it is is because of the tremendous volume of movement on the main line of the C. & O. and the lines of the Norfolk & Western in Kentucky, and the bottle neck lines operating through Kentucky to and through Birmingham and Chattanooga. The Clinchfield is another Kentucky line, but so far as I know it handles no Chattanooga or Birmingham coke. It does enter into the estimate of the traffic density in Kentucky. The C. & O. and Norfolk & Western do not serve the states of Tennessee or Alabama. In comparing traffic densities on general traffic, I think the fairest measure of determining the relative figures for the North and the South is the figure for the entire territory involved, but here we have a special traffic and the furthermost Southern point at which it is produced is at Birmingham, where the coal fields run out. And in this case I think that those facts should be given [fol. 620] consideration in the comparison. In determining the rates then in other directions from Birmingham, I

do not think I would advocate having the determination of the rate to be applied being based on the traffic density northward versus eastward or southward. I think in the determination of the rate level from Birmingham throughout the South, including the Florida peninsula, you should take into consideration the conditions that exist throughout the South. I do not agree that it is unfair to take traffic density from certain states simply because the movement of this coke happens to be confined to those particular states, when you could do the same thing in the North and take particular lines of railroad that move a heavy coke tonnage, and get a much higher figure than anything I have shown in the South. The movement of coke within the Central territory is more or less general throughout the length and breadth of that territory, which is also true on coke moving from Birmingham, to the extent that we can reach the territory and meet the competitive conditions. I do not think it would be fair to gauge the level of the rates on coke from Detroit to Mackinaw, Michigan, by the relative density prevailing between Detroit and Mackinaw, as compared with the density on the Pittsburgh & Lake Erie from Connellsville to Youngstown, Pittsburgh to Youngstown, Ohio, as that is within Central territory, where there is a widespread movement, just like there is from Birmingham and Chattanooga, throughout the South. You should use your territory density figures and average them, and so far as we are concerned, we have no objection to your using Central territory for that purpose, although Central territory is as much a part of Official territory,—that is, I should have said although New England territory is as much a part of Official territory as Florida is of the southern territory; but we do not insist that you use your New England territory density figures.

[fol. 621] I do not know if you apply Central Freight Association territory scale into New England Trunk Line territory. I know that the Seaboard scale has application in New England. I know that carriers serving the Central territory in many instances are the carriers serving the Trunk line and New England territory. Off hand, I couldn't tell you what is the nearest coke producing plant or point in Central territory to Birmingham or to Chattanooga. I would think maybe it would be Terre Haute. It would be close to four hundred miles distant from either of those points. In the year 1929 the Birmingham District used

6,700,000 tons of coal for coking, and 1,650,000 tons moved by railroad on the transportation charge. The balance moved over private railroads. Of this 1,650,000 tons moved by railroad, 1,522,000 tons was Alabama coal and 128,000 Virginia. The so-called low volatile coal comes from either Virginia or West Virginia.

In presenting my Exhibit 83 I make no contention that the rates from Southern Ohio to the central freight association territory destinations were not put on the Docket 3511 scale.

Q. Mr. Ribe, do you know of any reason why rates on coke from Central Territory—from the South to Central Territory should be on any lower basis than prevails from Central Territory to Western Trunk Line territory.

A. Well, in the first place, the competitive conditions would not be the same.

Q. Well, how about the transportation conditions?

A. We think that the competitive conditions are different, and that the transportation conditions are favorable to us from Birmingham to the Central Freight Association territory, and that there is sufficient reason for our having the Column 2 rates.

Q. You think that you- transportation conditions from the South are more favorable than they are from Chicago to Omaha or to Twin Cities?

[fol. 622] A. I personally do not recall what the densities are between those two Western Trunk Line cities.

As far as competition is concerned there are coke plants at Twin Cities, Duluth and other points in the eastern portion of Western Trunk Line territory.

Probably two or three years ago, I made study, or made studies of the densities in Western Trunk Line territory, as well as other territories. My recollection is that the density in the Eastern portion of that territory, that is, between the Mississippi and Missouri Rivers, is more favorable than in the South as a whole. That is my recollection. But I do not think that the density in that territory is anywhere near as favorable as between Birmingham and the Ohio River. The lines serving the Western Trunk line territory are quite generally the same as the lines traversing Illinois Freight Association territory, including the Northwestern, Illinois Central, Great Western, Rock Island, Milwaukee and the Burlington.

[fol. 623] Cross-examination.

By Mr. Hollopeter:

I do not know of any reason why the rate to Detroit, Michigan should be lower than to Lansing, Michigan, from Birmingham, when the distance is exactly the same. We didn't ship anything there during 1933, so I don't know what the situation there would be. From Birmingham to Detroit I advocate the Column 2 scale for 735 miles which is $4.55. We are advocating Column 2 to both points, and that column would result in the same rate; namely, $4.55. We are advocating the Column 2 scale to Lansing, Michigan, in the I. & S. Case, to the extent the destinations are involved. But we wish that ba-is extended to other points, that are not here involved. It would be true that in case the Commission should cancel permanently the suspended rates and substitute the basis we are proposing the rate then would be $5.00 to Lansing and $4.55 to Detroit.

[fol. 624] Cross-examination.

By Mr. Doebber:

I represent the Alabama Iron & Steel Shippers Conference, which organization includes all producers of coke in Alabama, except the Semet-Solvay Company, and I do not now and have never represented that concern. I don't know how their traffic is routed.

Cross-examination.

By Mr. Keeler:

I understand the plant at Ashland, Kentucky, is owned by the Semet-Solvay Company. Their plant in the Birmingham District closed down in 1932, and has not operated since. They have shifted their operations to some other point. They are now getting some coke from another producer. The reductions shown from Ashland also apply from Portsmouth, and Ironton, at which are other producers having no interest within the Birmingham District.

The figure of 47.7 cents average weighted rate includes the transportation costs on Alabama coal only. The figure of $3.50 includes the Virginia-West Virginia coal only. I have no weighted average on the two of them combined.

We do not object to the reductions from Ashland, Kentucky, to Central Freight Association territory points shown on Exhibit 83.

[fol. 625] Redirect examination.

By Mr. Norman:

If the Norfolk & Western serves any part of Kentucky it would be a very short branch, and I don't recall even a branch in Kentucky at the present moment. I know that the C. & O. line between Louisville and Ashland is a low density line, as to the Big Sandy Division it would probably be heavy. I did not intend to leave the impression that I regarded density of traffic figures as the proper basis for arriving at rate levels. We think that all the elements should enter into the making of rates, including density as one factor, competition as another, and operating conditions as still another factor. Density of traffic figures do not necessarily represent costs or do differences in density of traffic figures represent differences in cost.

Recross-examination.

By Mr. Day:

I said that my recollection is that the Norfolk & Western had no lines in Kentucky unless they had some short branches somewhat in that state. The C. & O. main line, the line that hauls this Pocahontas coal produced in such large quantities on the C. & O., runs through Ashland, Ky., and other Kentucky points along the south bank of the Ohio River in Kentucky until it reaches a point directly across the Ohio River from Cincinnati, where it crosses the bridge into the State of Ohio. The C. & O. also has a line running from Ashland to Louisville. I can't remember if the mileage of the L. & N. Railroad exceeds that of the C. & O. in the State of Kentucky.

[fol. 626] C. E. Widell, recalled as a witness, testified as follows:

Mr. Ribe's Exhibit No. 83 which has just been commented on previously has to do with the reductions on coke from

Ashland, Ky., on the Column 2, I. & S. Docket 3511 rates. I should like to add to that at Ashland, Ky., there is a fairly large commercial operation, consisting of I think a hundred and eight ovens of the Semet-Solvay type, owned and operated by the Semet-Solvay Company.

The entire production of these ovens is distributed in commercial markets according to the available information. This distribution is generally throughout contiguous territories, Southern Ohio, Southern Indiana, and Northern Kentucky areas, an area in which of course the Ashland ovens generally control the price levels. I am familiar with what our sales department must meet in the way of competitive prices and what those prices are based on, and wherever Ashland, Ky., basis is quoted naturally, it follows in the coke industry that those are the controlling ovens.

Mr. Day: I want to offer another exhibit in sur-rebuttal to Mr. Ribe's presentation. I desire to offer in evidence on behalf of the respondent Northern Lines an exhibit containing an excerpt of the testimony of Mr. Kerr, who previously testified in this hearing, in Docket I. C. C. 24160, in the matter of divisions, so far as Mr. Kerr's testimony in that case, and as shown in this exhibit, described the burdensomeness of transportation conditions on the lines of the Louisville & Nashville Railroad south of the Ohio River. We are trying to get in here a picture of the operations of the Southern Lines, to give the Commission some idea of the burdensome- of the transportation in that territory, compared with Central Freight Association territory.

Examiner McGrath: This will be Exhibit No. 84.

Mr. Norman: Now, Mr. Examiner, I object to the receipt of either one of these exhibits, as establishing any facts. If they want us — use the exhibit to establish that the witness [fol. 627] has contradicted himself, or something to that effect, why, all right, but I object to it being received as establishing any facts, because I have had no opportunity to cross-examine th- witness with reference thereto.

Examiner McGrath: It occurs to the Examiner that that objection is well taken, and the objection is sustained as to that.

Mr. Day: The exhibit contains declarations against interest of our adversaries here, and on that account we regard it as competent.

Examiner McGrath: It has been objected to, and the objection has been sustained.

Mr. Day: Respondents except. I desire to make an offer of proof. Respondents, in view of the ruling of the examiner in excluding the exhibit which respondents asked to have marked for identification Exhibit 84, make offer to prove that in I. C. C. Docket No. 24160, in the matter of Divisions, joint inter-territorial rates between Official and Southern Territories, Mr. J. G. Kerr, Assistant to the Vice-President of the Louisville & Nashville Railroad Company, at pages 6667, et seq. of the stenographer's minutes in that case, testified in considerable detail regarding the burdensomeness and expensiveness of the operation of the Louisville & Nashville Railroad on its lines south of Evansville and Cincinnati. The respondents by this evidence will prove that these lines of the Louisville & Nashville Railroad operate up and down the hills, across numerous water sheds, following the winding Ohio River, lined with cliffs on one side or the other, and where the Louisville & Nashville Railroad encounters frequent high water; that the said line of the L. & N. Railroad is not a water-level line or route, but crosses the Ohio River at Cincinnati, and runs almost due south along the Licking River, crossing the Licking River four miles from Cincinnati, to our Decoursey Yard lying two miles farther south along Licking River. [fol. 628] Traffic to Louisville doubles back from the DeCoursey yard 2 miles to Latonia, then turns west 3 miles to Bank Lick Creek at Maurice, and then goes in a southerly direction, climbing up the valley of Bank Lick Creek 250 feet—There are a great many other facts we want to establish by the same exhibit.

Mr. Day: As I understand it, the offer of the respondents is rejected by the Examiner.

Examiner McGrath: That is correct.

Mr. Day: Respondents duly except to the Examiner's ruling. Exhibit 83 received in evidence.

Mr. Day: The Northern Railroad respondents request an oral argument of this case before the entire Commission, Mr. Examiner.

Mr. Norman: I will say that the interests for which I appear join in that request.

Examiner McGrath: If there is no further testimony, the hearing in this proceeding is closed.

(Whereupon the hearing of the above-entitled matter was closed.)

[fol. 629] Mr. Day: Plaintiffs' offer in evidence and ask to have marked as Plaintiffs' Exhibit 5 copy of the transcript of the stenographer's notes of the oral arguments held at Washington, D. C., on December 6, 1934, before the Interstate Commerce Commission in Investigation & Suspension Docket 3985, coke from Alabama and Tennessee to Central territory as certified to by the secretary of the Commission under date of October 12, 1936.

Mr. Payne: Now, if your Honors please, it is not customary in these cases to introduce before the Court a copy of the oral argument before the Commission, and I was wondering if I might inquire of Mr. Day what was the purpose of this exhibit.

Mr. Day: The purpose of the exhibit, Mr. Payne, and if the Court please, is to show that there was no contention raised by any of the parties before the Commission that the rates contended for by these Plaintiffs before the Commission were unreasonable. That there was no such contention and the order that we complain of particularly here is an order that was made without a hearing after the Commission had made an adjudication on the record before it in I. & S. Docket 3985.

Judge Evans: It may be received and marked. I do not [fol. 630] know its pertinency or relevancy or binding effect.

[fol. 631] Mr. Day: The Plaintiffs at this time desire to offer in evidence an affidavit by one Roy S. Kern. We ask that this be marked Plaintiffs' Exhibit 6, and be received in evidence.

Mr. Payne: What is this?

Mr. Day: An affidavit by Mr. Kern.

Mr. Payne: If the Court please, we object to that on several grounds: First, we have had no notice of it; second, the rates required by the Commission order in this case have already gone into effect, having been made effective August 13th of this year, and it seems that an affidavit at this time—what is the purpose of the affidavit?

Mr. Day: Mr. Payne, the affidavit has attached to it, and the purpose of the affidavit, I might say, is merely to iden-

tify and to prove the authenticity of these documents. There is attached a letter from the southern railroads under date of September 22, 1936, asking the northern railroads to negotiate with the southern lines the matter of divisions under the rate which the Commission prescribed in the assailed order. The relevancy of this particular document will appear as we explain the point we have on that proposition, which is that the Commission assumed, when it made [fol. 632] the order here, that the question of divisions as between the northern lines and southern lines was settled and that therefore, inasmuch as the northern lines were going to get a certain amount of divisions, and that those divisions corresponded to the level of the rates in our own territory, we should be satisfied and we had no cause for complaint. The purpose of this is to show, along with showing there was no evidence in warranting the Commission in making the assumption that it did, that the southern carriers themselves had no such understanding of the divisions being fixed or determined. The other two documents, I might say, attached to this affidavit, are petitions filed by the southern coke manufacturers as a result of which the Interstate Commerce Commission made its second order in Docket 3985 without a hearing, and here again the purpose is to show that the southern shippers had not asserted the reasonableness of the rates which we are contending for, but they ask the Commission to permit the southern lines to establish these rates if they wanted them, but if not, to bar the northern lines from any voice in the measure of the rate. In other words, we had to either take the scale of rates from the south that applied within our own territory here north of the Ohio River or the alterna- [fol. 633] tive was to let the southern lines put in a higher basis if they so desired notwithstanding that the rates are joint through rates and we are involuntary partners of those rates, having been compelled to join in them by orders of the Commission. Now, that is the purpose of these petitions.

Mr. Northcutt: The dates of those petitions are what, Mr. Day?

A. It is set out in the affidavit, Mr. Northcutt, but I will say that the Tennessee petition, the Tennessee manufacturers' petition was received on March 24, 1936 and the Alabama manufacturers' petition on March 31, 1936.

Mr. Northcutt: They are not incorporated in the transcript of record.

Mr. Day: I know they are not.

Mr. Payne: They are part of the record.

Mr. Day: But this is not in the certified copy of the record we have offered, which is only the record of the evidence before the Commission.

Mr. Payne: If the Court please, the objection is withdrawn insofar as it relates to the two petitions which are part of the record before the Commission. The objection goes to the letter on the ground that in the suit to test the [fol. 633-A] validity of a Commission order, only the evidence introduced before the Commission is relevant.

Judge Evans: Subject to the objection, let it be received.

[fols. 634-635] PLAINTIFFS' EXHIBIT 5

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of transcript of the stenographer's notes of the oral argument held at Washington, D. C., on December 6, 1934, before the Commission, in Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, the original of which is now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 12th day of October, A. D. 1936.

George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal Interstate Commerce Commission.)

[fol. 636] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. 3985

Coke from Alabama and Tennessee to Central Territory

I. C. C. Building, Main Hearing Room,
Thursday, December 6th, 1934,
Washington, D. C.

The above entitled matter come on for oral argument at ten o'clock a. m.

Before: The Commission.

Present: Commissioners Lee (Chairman), Meyer, Porter, Farrell, Tate and Splawn.

APPEARANCES

Leo P. Day, 625 La Salle Station, Chicago, Ill., appearing for the Central Freight Association Lines, respondents.

Mr. R. B. Gwarthmey, Washington, D. C., appearing for the North Carolina and St. Louis Railway Company and Southern Railway Company.

Mr. E. D. Mohr, Louisville, Kentucky, appearing for the Louisville & Nashville Railroad Company.

Mr. J. V. Norman, Marion E. Taylor Bldg., Louisville, Kentucky, appearing for the Alabama Iron and Steel Institute.

Mr. William W. Collier, Jr., 928 Frick Bldg., Pittsburgh, [fols. 637-638] Pa., appearing for the Diamond Alhale Company.

Mr. C. E. Widell, 14 Cummins Station, Nashville, Tenn., appearing for the Tennessee Products Corporation and the Black Diamond Coal Mining Company.

Mr. A. B. Crunk, 1024 Hume Mansur Bloc., Indianapolis, Ind., appearing for the Citizens Gas Company, et al.

Mr. H. A. Hollopeter, 629 Cherry St., Terre Haute, Ind., appearing for the Indiana Consumers Gas & By-Products Company, et al.

[fol. 639] Proceedings

Commissioner Lee: The Commission will now hear arguments in I. & S. 3985, coke from Alabama and Tennessee to Central Territory.

Mr. Orcutt, you have 70 minutes, or Mr. Day?

Argument of Mr. L. P. Day

On Behalf of C. F. A. Lines

Mr. Day: May it please the Commission, this is an investigation and suspension case in which the tariffs under suspension carry increased rates on coke from the Birmingham, Alabama, Chattanooga, Tennessee, and Wise County, Virginia, coke producing districts to destinations in Central Territory. The basis of the rates in these suspended schedules is the scale that the Commission prescribed in I. & S. Docket 3511, decided about a year ago.

It is the final step in completion of the revision of rates under the scales fixed by the Commission in that case.

Commissioner Meyer: That is chargeable to Division 4 rather than the Commission.

Mr. Day: The decision is, that is true, your Honor. However, there were two petitions for rehearing filed and passed upon by the entire Commission, and denied by the entire Commission. I think to that the extent that the entire Commission had something to do with it.

The I. & S. 3511 proceeding involved in the first place a [fol. 640] proposed schedule of rates on a distance scale basis to apply between all points in Central Territory.

Prior to the decision there was no basis or scale of rates uniformly applied throughout the territory. You find a rate at one level between certain points, and between some other points on a higher or lower level. The condition of the rates was chaotic, to say the least, and it was hoped that approval by the Commission of the carriers' proposed scale in that case would bring about a uniformity, orderly adjustment.

There was also before the Commission a number of formal complaints involving among others attacks on the rates from points in Central Territory to Western Trunk Line Territory destinations. There was an attack on the rates from Birmingham to Central Territory points with allegations of unreasonableness and undue prejudice to Birmingham in preference of Chattanooga and points in Central Territory.

There was a complaint attacking rates from Birmingham district to Omaha, Nebraska, and in all of these proceedings there was the issue of not only unreasonableness, but also the undue preference and prejudice as between these various competing districts.

Within Central Territory we had one set of shippers advocating a relatively high rate for long distances and low [fol. 641] rates for short distances. On the other hand, we had shippers in C. F. A. Territory who sought just the reverse. We had the southern shippers, Birmingham, attempting to get into Central Territory on a basis of rates similar to that which would apply within Central Territory, and also asking at the same time that their rates be made differentially over Chattanooga into Central Territory when the traffic moved through Cincinnati, Louisville or Evansville, and a parity between Chattanooga and Birmingham maintained, where the traffic moved through Cairo.

So we had all of these conflicting interests proposing as they did various types of rates and scales.

As I say, some of the scales were designed to favor the long haul shipper and others to favor the short haul shipper.

The hearing in those cases lasted about three weeks. There was a large amount of testimony, and voluminous exhibits offered.

The Commission went into the question of these rates very exhaustively. I beg pardon, the decision was by Division 4, and as a result the Commission found that the rates the carriers had proposed for application within Central Territory had not been justified, and a scale somewhat lower than the carriers' proposed basis was prescribed.

Commissioner Farrell: You say that was I. & S. 3511?

Mr. Day: I. & S. 3511. From the South into Central Terri-
[fol. 642] tory the Commission fixed a scale of rates related to the Central Freight Association scale to somewhat higher. As nearly as we can determine, the scale seems to be from 8 to perhaps 11 per cent higher than the C. F. A. intra-territorial scale.

From the Central Territory origins to Western Trunk Line Territory the scale prescribed was identical with that fixed from the South into Central Territory. In other words, the interterritorial scale would apply from the South into C. F. A. and from the C. F. A. into Western Trunk Line Territory.

In its decision, Division 4 stated on several occasions that they were not satisfied from the character of the evidence produced that sufficient showing had been made of undue prejudice, but that in any event the scales, the taking effect of the scales which were there prescribed would remove any undue prejudice that existed. That is stated on page 677 of the decision, and in substantially the same language on the following page.

After that decision was handed down, the Central Freight Territory carriers immediately set to work, first, to publish rates within their own territory on the basis of the scale promulgated by the Commission; and, in the second place, to have the interterritorial rates revised to the so-called Column 3 scale basis, which was the interterritorial scale.

There was no difficulty, of course, about readjusting
[fol. 643] the rates within Central Territory, and they became effective March 15, 1934. At the same time rates

from the South which had been on a combination basis in a great many cases, and therefore were considerably higher than the new scale of rates, and the joint through rates, which also, in many instances, were higher than the scale basis, were reduced to the level of the scale effective at the same time.

But we ran into some difficulty when it came to increasing those rates from the South into Central Territory which were lower than the scale. Our southern railroad friends refused to comply with notices sent them by the Central Territory lines to revise all rates to the scale basis, whether they be higher or lower, so that in order to give effect to the scale entirely, the Central Territory lines were forced to go through the form provided by the Commission's rules and revoke their concurrences in joint rates which were lower than the scale basis. The southern roads thereupon filed these tariffs containing rates on the scale basis.

Commissioner Farrell: When you speak of the scale basis, you mean Column 3, do you not?

Mr. Day: Column 3, the interterritorial scale.

The southern shippers and the southern railroads asked for suspension of the tariffs and the concurrences, and such suspension was granted by Division 2.

[fol. 644] The C. F. A. carriers then filed a petition asking the entire Commission to review and reverse the suspension order of Division 2, but their petition was denied, and this case went to hearing.

Of course, the C. F. A. carriers justified the proposed schedule primarily on the fact that their rates, and part of the revision contemplated by the decision in 3511, and unless there have been in evidence in this new proceeding some new facts, unless it is shown that the Commission proceeded on a misconception or a misapprehension of the facts in the former case, then under a well recognized and oft stated rule of this Commission, it will not interfere or change its prior findings.

There is nothing new in this record offered in Louisville, in September. There is no showing or contention, as I see it, that the Commission proceeded on a misconception or misapprehension of the facts, so that following the rule that I have stated the Commission should promptly vacate its suspension and permit these tariffs to go into effect.

Now, we have a situation today with these rates suspended where rates to a number of points in Central Terri-

tory are on the scale basis. All of the points in Central Territory are on the Central Territory scale and do not for a minute think that the revision in Central Territory involved nothing but reductions, for the Central Territory [fol. 645] producers. It did no such thing. Many of the changes resulted in substantial advances in Central Territory, particularly when you consider the relatively shorter hauls within that territory than from Birmingham or Chattanooga.

So that we have in effect today a rate to Cleveland, for instance, on the scale, and a rate to Detroit, about 35 or 40 cents lower than the scale. Now, there are two points approximately equal in size, comparable in almost every respect from a transportation, from a commercial standpoint —there is not much difference between the two cities. Yet one is accorded the benefit of these low rates; the other is placed on a scale basis.

Now, the record contains innumerable instances of that kind that I could cite, but I think that is sufficiently illustrative of just what the suspension of these rates has done to our rate adjustment.

Commissioner Farrell: Well, would it bother you if I would mention one point there that possibly you would like to speak about?

If I understand correctly, one of the difficulties of the Commission in this case is that the Illinois Central, the Northwestern, the Burlington and C. & E. I. have rates that they have had in effect in the past and refused to increase, to correspond with these rates that have been suspended. Am I right about that?

[fol. 646] Mr. Day: That is true, your Honor, and the Illinois Central does control the situation to points in Illinois territory.

Commissioner Farrell: Well, can the Commission control the Illinois Central and the others that I have mentioned there and make them increase their rates?

Mr. Day: I think the Commission has the power to compel the Illinois Central to increase those rates.

I would like to show the extent of the territory that they control, however. The Illinois Central has its own rails from Birmingham to Chicago, to St. Louis and East St. Louis, to Springfield, to Madison, Wisconsin, to Indianapolis; and as the Commission well knows, their lines pretty generally cover the state of Illinois; so that to the extent

that they reach those points they are able to dominate the situation, and unless the Commission will take hold and compel absolute compliance on the part of the Illinois Central and the other southern roads with the scale of rates that is now uniformly applied by the railroads in Central Territory, of course, we will be in this difficulty, that rates via our CFA routes to points reached by the Illinois Central will be on the higher scale basis.

Of course, if the Commission should feel that it does not want to compel the Illinois Central and the Louisville & Nashville, and the Southern, all of which serve Illinois and [fol. 647] Indiana territory, that should not militate or interfere with approval of the rates you have before you here to Central Territory.

The rates within Central Territory and the rates from the South into Illinois territory have always given the C. F. A. carriers and the Commission a great amount of trouble. They have been referred to in numerous cases. In fact, in practically every complaint we had in Central Territory against our rates, the complainants were always relying on these low rates that would show in Illinois territory. Whether it was paperboard or iron or steel, it did not make much difference, canned goods—they were always able to show that the rates in Illinois were much lower than our C. F. A. basis, but notwithstanding that showing, the Commission invariably found that the Central Territory bases were not unreasonable. So I do not think that these Illinois rates constitute a stumbling block so far as the approval of these rates to Central Territory is concerned.

However, in the interest of removing undue prejudice and bringing rates that we regard as unduly low up to a level that can be said to be compensatory, we think the Commission should direct these southern railroads to revise all of their rates, to the territory north of the river, and put them on this scale basis. In that way you can insure uniformity of treatment, equality of treatment to all ship- [fol. 648] pers and receivers.

The rates to Western Trunk Line Territory, as I have stated, are on the interterritorial scale, the same as the rates from the South. Those rates are in effect. There is no reason from a transportation standpoint why rates from the South to Central Territory should be any lower than from Central Territory to Western Trunk Line Territory.

If anything, transportation conditions are more favorable to the west, that is, to the Missouri River territory, than they are from Birmingham.

That brings me to the point of discussing the relative differences in transportation conditions, and the need for a level of rates from the South higher than apply within Central Territory.

The record in this case contains evidence similar to that offered in 3511 as to the more adverse transportation conditions in the South, and in the transportation of coke from the South to Central Territory destinations. There are figures as to traffic density, revenue per ton mile, and of the same nature as that which was considered and discussed in I. & S. 3511.

Of course, in hauling coke from the South the carriers must cross the expensive bridges at the Ohio River, which has always been a substantial item in transportation expense, and then again the movement from the South in-
[fol. 649] volves multiple line hauls, whereas practically any haul within Central Territory can be performed by a single line in that territory without division of revenue with these other railroads.

Of course, that is not true in all cases, but I think it can safely be said that to any point of importance in Central Territory the haul can be performed from any producing point by a single line. That is, for instance, from St. Louis to Detroit, or Detroit to Chicago, or Indianapolis to Cleveland. It is hard to think of any movement between points of any size that cannot be performed in Central Territory by a single line.

The Commission has recognized these differences in transportation conditions in a great many cases, and in practically every instance has held that the rates from the South should properly be on a higher basis than apply within Central Territory.

Now, in two cases, two recent cases in particular, the Commission has given a great deal of thought and consideration to this question. One of the cases is the Blue Ridge Glass Company Case, which I think your Honors are familiar with.

It has been here to my knowledge three or four times on hearings and rehearings.

Another case that has been before you on several occa-
[fol. 650] sions was the one involving stoves, ranges and

house heating apparatus. I think that is the name of it. In that case the contention was made by the southern shippers and the southern railroads, and opposed by the northern railroads, that rates from the South into Central Territory should be on the Central Territory basis.

As I have stated, the question was considered exhaustively, and as a result of the consideration given the subject by the Commission, it was held that the more difficult transportation conditions in the South warranted a higher level of rates than applied within Central Territory.

In both cases it happened that the relationship of the rates to each other was the same. In other words, on coal and wood stoves from the South into Central Territory you prescribed 31½ per cent of first class.

Commissioner Farrell: Instead of 35, which was the Official Territory percentage?

Mr. Day: That is correct, your Honor. Those were exactly the percentages in the Blue Ridge Glass Case as regarded rough rolled glass from the South into Central Territory.

The keenness of the competition and the need of the southern producer or manufacturer to get into these Central Territory markets was stressed in those cases, and we think the Commission in those cases, as did Division 4 in [fol. 651] I. & S. 3511, gave the maximum amount of consideration to the competitive needs of the southern shipper and the minimum consideration to transportation conditions from the South as compared with those within Central Territory. In any case, the difference in the two sets of rates will average between 25 and 30 per cent higher interterritorially than within Central Territory.

In other words, while the percentage of first class is lower than for the interterritorial move, the level of the interterritorial class rates are so much higher that that 31½ per cent of first class translated into cents per hundred pounds produces a rate about 25 or 30 per cent higher than would apply in Central Territory for a rate of 35 per cent of first class.

Commissioner Farrell: Mr. Day, that is one of the things I wanted to ask you about. As a matter of fact, this Column 3 basis that has been used in the rates that have been suspended, is that covered from southern points to the Central Territory points by one classification or two?

Mr. Day: These coke rates are not made with relation to classification. Is that what you mean, on coke?

Commissioner Farrell: Yes. They are commodity rates?

Mr. Day: They are not made at all with relation to the class rates.

Commissioner Farrell: Well, one of the troubles that I [fol. 652] have had in the past is that the Official Territory scale is made on one basis, and the southern on a very difference basis, for instance, fifth class in Official is 35, while sixth class, 40 per cent of first class.

Mr. Day: Yes.

Commissioner Farrell: Now, do you have that difficulty at the border here?

Mr. Day: There is no such difficulty in respect to these coke rates.

Commissioner Farrell: That is Column 3 commodity rates?

Mr. Day: Column 3 commodity rates, without regard to what the class rates are, and as I have stated, they bear only a slightly higher percentage. They are only slightly higher in percentage than the C. F. A. scale.

There have been a number of other interterritorial cases. For instance, rates on silicate of soda and iron lamp posts, and a number of others I could mention, many of the commodities being of low grade, in which the Commission did fix interterritorial rates with relation to class rates.

Then, there were some other cases in which the Commission in fixing interterritorial scales proceeded without regard to the level of the class rates, for instance, on cement.

The Commission fixed the scale to apply and it is not related to class rates, but the interterritorial scale is much higher than the scale applying within Central Territory. [fol. 653] On livestock, in the White Provision Case, and in the Knoxville Freight Bureau Case, the Commission prescribed scales of rates on livestock for application from Central Freight Association Territory into the South which are considerably higher than rates within Central Territory, and then, apart from that we have cited other cases in our brief, in which the Commission prescribed rates on other commodities for interterritorial application between a number of specific points, as you did on water, gas, tar, for instance, and as you did on wrought iron pipe. Those rates, the same as in the case of the other commodities I

have mentioned, are much higher interterritorially than for application to the same commodities within Central Territory.

Another thing that shows the low level of the interterritorial scale is the fact that it is so much less than the scale of coke rates applying between points in Trunk Line and New England Territory. Trunk Line, New England, as the Commission knows, are part of the Official Classification Territory and generally on a great many commodities rates all over Official Territory are the same. Yet, these coke rates applying under what is called the Seaboard Scale fixed by the Commission and followed in a great many subsequent cases are considerably higher.

For instance, that at 500 miles the Seaboard Scale is $4.45. This interterritorial scale for that distance is only [fol. 654] $4.16.

Now, there isn't any transportation justification for lower rates from the South into Central Territory than these rates that apply from Trunk Line points to New England or between Trunk Line Territory points. Yet that is the situation.

Commissioner Farrell: That $4.16 rate is the Illinois Central rate, isn't it?

Mr. Day: That is the rate to Chicago?

Commissioner Farrell: Yes.

Mr. Day: No, $4.30, and we propose $4.70 from Birmingham to Chicago.

When comparison is made between the rates and earnings on coke with the earnings on other low grade commodities which have been passed upon by the Commission, it will be seen that these, coke, the revenue derived from coke traffic is much less than it is on the other commodities. We call, for instance, attention to the comparison with the water, gas, tar rates. That is a commodity worth about six or seven dollars per ton and loading to 90,000 pounds per car. Yet the rates fixed by the Commission are higher than the rates on the coke, which is of a somewhat higher value, and loads somewhere between 60,000 and 68,000 pounds.

The average loading on the Nashville, Chattanooga & St. Louis Railway, one of the lines serving Chattanooga, for a [fol. 655] five and a half year period, was shown to be 30 tons.

The Southern Railroad, in its exhibit, used an average loading of 34 tons. The carload revenue on those two commodities was around $170.00 on the coke, and $227.00 on the tar for comparable hauls.

Commissioner Tate: Mr. Day, do the northern carriers get for the haul from the border point to points of destination as much revenue as they would get for hauling coke originating in Central Freight Association Territory for the same number of miles under the scale that the Southern road wishes to put in?

Mr. Day: I would not think so, your Honor. In the first place, as I said a while ago, we get the entire haul in Central Territory, or can perform the service. If we get coke at Buffalo to haul it to Chicago or St. Louis, we get the entire haul on it, the entire revenue.

It is conceivable, of course, that there might be a movement via two lines in which case the northern railroads would divide the revenue between themselves, but I think that joint hauls on coke within Central Territory would be relatively rare. Further than that I am not clear as to the status of our divisional arrangement with the southern railroads on coke.

We attempted to develop something about that in this record, but we did not get very far with it. One of the [fol. 656] witnesses for the Southern Railroad said coke was involved in a pending divisions case, and then that later it was taken out. We know from past experience that the Southern Railroads in these divisions cases, and I suppose in negotiations with the northern railroads, contend that on account of the more difficult conditions in the South they are entitled to charge greater revenue proportionately than the C. F. A. lines are entitled to.

I do not think that it could safely be said that the Central Territory lines would get the same amount of revenue on traffic coming off of southern railroads as they would when the traffic comes off the C. F. A. railroads and is moved for substantially the same distance. I think that would be far fetched. I know we are not getting it on coal.

I know the northern railroads get a very small proportion of the rates from Kentucky and Tennessee into Central Freight Territory moving to Chicago, for instance; and I do not believe that the southern railroads would be inclined to be any more generous than us in the matter of

dividing these coke rates. Certainly, we have no assurance in this record that they would. But aside from that, as I say, there is not the occasion to divide revenue in Central Territory such as there is when the traffic comes from the South.

In one case it is inevitable; in the other case it is a pos-
[fol. 657] sibility.

Now, the evidence offered by the protestants, both shippers and carriers here, was similar in character to that which they presented in I. & S. 3511. We were presented, as usual, with these low coke rates within the South. The same hodge podge adjustment that the Commission referred to, that Division 4 referred to in I. & S. 3511, at Page 677 of the report.

Those rates that the Commission said were untreated, and that the southern lines said they were going to revise.

You can take those rates and prove almost anything by them. You will find the same rate applying for 700 miles as for 400 miles. That is just an example and it is not far fetched. The exhibits are replete with situations of that kind.

Then there was offered in evidence some comparisons with light loading commodities. They showed what the earnings on charcoal were, and hay, and mineral wool, and furniture, which they said loaded to 12,000 pounds per car, and several commodities of the same character; and they said that because we got $115.00 a car for hauling stuff like that six or seven hundred miles, we should be content to take the same revenue on coke.

Of course, that sort of comparison was before the Commission in 3511, and rejected there, as we hope the Commission will reject it here.

[fol. 658] There was a comparison made in several of the witnesses' exhibits with rates and earnings on asphaltic limestone, a commodity which the Commission knows is used in road building, and like other road building materials, is given the benefit of the lowest possible rates by the Commission.

They showed that the rates on this asphaltic limestone from the South to Central Territory were fixed at a much lower level than the coke rates, but Mr. Kern, who testified in behalf of the Central Freight Association lines, showed a complete picture that the rates within Central Territory for corresponding distances on the same or any analogous

commodity were also much lower; in other words, there was about the same relationship between the Central Territory rates on this road building material as there was interterritorially, just as there is such relationship under the scales of rates in I. & S. 3511.

Then Mr. Roby, testifying for the southern railroads, offered as his Exhibit No. 24, a statement of numerous scales fixed by the Commission, or applying on various commodities. The exhibit was designed to show that the coke scale progresses at a moderate rate for the longer distances. And there are some of the scales that he produced which show a slower rate of progression for the longer distances, but when you consider representative commodities such as cement, such as fertilizer, that move within Central Territory in large quantities, and also move in large quanti- [fol. 659] ties from the South into Central Territory, set those scales up against the coke scales you will find the progression is even at a greater rate than any, than in the case of the coke scales. But as I attempted to show, it is possible to get any kind of a picture that you want from these different scales promulgated by the Commission. I think the fair test and the only proper comparison is to take the scale of rates fixed on cement, take the scale of rates applying on iron or steel or almost any of these other commodities, and contrast, in the first place, the rates and earnings under those scales with the rates and earnings on coke for comparable distances.

And another test of the propriety of the Commission's scale would be to take the interterritorial scale on one of these other commodities and set it up against the C. F. A. scale on the same commodity. If you do that, you will find that not only is this coke scale justified, but it is proved too low.

Picking a scale out of the air, I don't think it proves anything. I don't think it has any evidentiary value whatever. Mr. Roby was careful not to attempt the comparisons that I have suggested would be proper. He has omitted in many cases the interterritorial scales. He shows, for instance, what the livestock scale is in C. F. A. Territory, but he does not refer to the White provision scale. I think [fol. 660] he has both cement scales in his exhibits but the purpose, as I have stated, was to show an improper rate of progression for the longer distances.

With respect to the feature of undue prejudice, I think the only prejudice shown in this record is that against the C. F. A. producers which arises from the fact that their rates have been put on the basis of the 3511 scale, while their competitors in the South are still shipping on the former low rates, or present low rates. The differences in the proposed rates and the rates applying within Central Territory are eminently justified by the differences in transportation conditions prevailing in the two territories and for the different hauls.

We think the Commission made the difference too slight. We had advocated that rates from the South be published on a so-called laminated basis which would have made the through rates from the South about 5 per cent higher than was fixed by Division 4, and we felt that that would go as far as the Commission or the carriers could properly go in overlooking the geographical, the disadvantage of geographical location of the southern shippers. That, we think, is something the Commission should not give too much cognizance to, but we know from past experience and from the decisions of the Commission in the past that they are going to fix a scale of rates that will enable the south- [fol. 661] ern shippers to compete in Central Territory, and we are reconciled to it, although we do not think that it is justified by transportation conditions. We think the proposed rates being as they are on the basis fixed by the Commission and designed to secure absolute equality of treatment to all shippers is proper and should be approved by the Commission.

Commissioner Lee: Reserving the balance of your time, Mr. Day?

Mr. Day: Yes, I would like to reserve the balance.

Argument of Mr. A. B. Cronk

On Behalf of Citizens

Gas Co. of Indiana, et al.

Mr. Cronk: Your Honors, Mr. Day has, I think, given you a pretty thorough outline of what this case is about. I think you will observe from what he said, due to the fact that when Docket 3511 arose, there were a good many complaint cases filed, cited along with that case, numerous of which were filed by the C. F. A. producers charging that

their rates in Central Territory were unreasonable, too high, and also containing the allegation that the rates from the South, Chattanooga and Birmingham, other points in the South, were too low, creating a preference to the southern shipper, and a prejudice to the northern shipper, and the Birmingham producer filed a complaint in which he not only alleged that his rates were too high, but that they were prejudicial to him in relation to the rates in the North, [fol. 662] and he also complained incidentally that his rates were too high, compared with Chattanooga and they were considerably higher than Chattanooga, and there was a very wide spread there in those rates.

Well, what happened was that as far as the Birmingham man's complaint in connection with the C. F. A. rates being too low, he got some relief on that situation because most C. F. A. rates were increased, not all, of course. I think a study showed that it, all the rates, decreases and increases, and throw them together and apply the tonnage to them, that the carriers would get a considerable increase out of the hauling of coke, and rate for rate, I think the majority of the rates were increased.

Also, the southern shipper from Birmingham got very great reductions in his rates to Central Territory. He complained about those rates, said they were too high, and the Commission found they were too high and reduced his rates.

Now, there weren't just a few reductions. There were a vast number of reductions. I think, in the tariff it showed that there were about 11,000 reductions. Of course, that includes all points in the territories, some very insignificant points that is true. On March 15, in undertaking to comply with the order in 3511, which involved the complaint [fol. 663] case from Birmingham, the carriers gave to Birmingham all these reductions which the order prescribed, the Column 3 basis. They gave the increases and the reductions to the Central Territory, but as Mr. Day says, when they came along to bringing the low rates up to the scale, and there were a good many rates lower than the scale, not a great many, but a good many, I think that there were 35 or 38 rates at least less than 40 rates from Chattanooga that are proposed to be increased in this proceeding, and a good many more from Birmingham, but I think less than 15 per cent of all rates from Birmingham were involved in this proceeding as increases.

Well, when they came along to ask the southern carriers to publish the rates on the scale which are lower than the scale, then, of course, the difficulty arose. The southern lines did not feel that they ought to do that. The southern shippers encouraged them. They saw, "I die" on that problem just as they northern carriers saw, "I die" on the other side of the controversy. But I think you should bear in mind that the northern carriers were in somewhat of an embarrassing position.

It might be very well for a southern line to say that they were going to reduce, to increase the rate up to the scale which was prescribed as a maximum scale and probably not be subjected to any charge of undue prejudice, but a [fol. 664] northern line who had put on increases in Central Territory and complied with that order in so far as it prescribed maximum reasonable rates, would be open to a charge of undue prejudice if they joined in rates from the South which were on a substantially lower basis than the Commission had indicated was reasonable. So that it was not a matter of the northern lines trying to force something on the southern carriers. It was rather a position of the northern carriers, that they were under some injunction to at least make an attempt to comply with the order.

Now, when they attempted to comply with the order, Mr. Van Norman says that is demanding a pound of flesh, and he thinks that is a very unjust thing to do. Well, it seems to me that the northern lines pursued exactly the course that they should have pursued if they wanted to make in good faith, an effort to comply with the Commission's order.

Now, the southern interests, carriers and shippers, point out that the Commission in deciding its case in Docket 3511 did not make any finding of undue prejudice. Well, that is true. They made no finding of that character. They did say in their decision that the scale which they prescribed would remove any undue prejudice which seemed to exist, but whether they did or not, they did prescribe what they designated as a maximum reasonable basis.

Now, the southern lines who are now publishing these [fol. 665] tariffs are seeking to bring the rates up to a maximum reasonable basis, so that whether the Commission found undue prejudice or not, they at least prescribed the maximum basis which the carriers are now seeking to bring the rates up to. So that it is not important, it seems to me,

whether the Commission in Docket 3511 found undue prejudice or did not find undue prejudice.

Commissioner Farrell: Is that quite correct? I understood you to say the southern lines were now trying to bring the interterritorial rates up to the rates that Division 4 prescribed as reasonable. Did I understand you correctly?

Mr. Cronk: Yes; I did say that, your Honor.

Commissioner Farrell: I understand that they are protesting against some of them being brought up to that.

Mr. Cronk: Well, that is right. They are protesting. They published the rates and immediately upon filing the rates they asked the Commission to suspend them. Now, whether they are proposing the rates or not seems to me to be a rather debatable question. They said they published them because somebody forced them to; that there was duress and a compulsion about it. Well, as long as the Commission has the power to determine divisions and levels of rates it seems to me that there could be no situation where one road could compel or force or by duress and threat compel another road to publish a rate which they wanted to join in. So I say for that reason, they [fol. 666] proposed the rates on their inter-tariffs, they at the same time asked that the rates be suspended. So, we have the situation here where the Commission simply prescribed a maximum reasonable rate from the South to the North, and the carriers, whether they be southern or northern, are proposing to put their rates up to that basis.

Now, whether those rates should go up to the maximum reasonable basis or not, depends of course on two questions. The Commission could only strike it out if it in some way violated some provisions of the law and, of course, the two ordinary ways in which it might violate the law is, it would be too high, which would be one way.

Well, we have got a scale which the Commission prescribed in Docket 3511, and there is no charge that we have exceeded that scale, so I take it there is no question about the rates being higher than the maximum reasonable level. As a matter of fact, the witnesses for the two principal railroads in the South testified that they did not think that the proposed rates were in excess of maximum reasonable rates.

In other words, take everything else out of consideration except transportation conditions, and they said the rates were not too high. And Mr. Widell, who represents the Chattanooga shippers, said he did not think the rates were in excess of maximum reasonable rates. He did say he [fol. 667] thought they were in excess of minimum reasonable rates and ought to be kept to minimum reasonable rates, but he said they were not in excess of maximum reasonable rates. So it seems to me since they are not in excess of the rates the Commission prescribed, no question is in this case about the rates violating Section 1 of the Act.

Now, if they do not violate Section 1 of the Act, then you have got to look to some other set of rates.

Commissioner Meyer: Are the southern carriers in the other room asking to increase these rates?

Mr. Cronk: Yes, that is right. They are asking to increase the northern rates, too, northern carriers, so that when you go to the question of Section 3 you have got to look at some other set of rates, and, of course, they would be the competitive rates, rates in Central Territory. But they likewise were established as maximum reasonable rates by the Commission, and there is no charge that they put in rates contrary to that provision, except in a few instances where truck competition or some other inter-complaint arrangement has caused carriers not to go to the full basis.

So that if the northern rates are on a maximum reasonable basis, and the proposed rates are coming up to a maximum reasonable basis, it seems to me that there just cannot be any question about these rates in any way violating any provision of the Act.

The Commission has often held, and the Supreme Court [fol. 668] has held that where two sets of rates are within the same zone of reasonableness, that is, both maximum and reasonable rates, are both minimum, or occupy the same position in the zone of reasonableness, that there cannot be any violation of Section 3, and that is exactly the situation that we have here.

Commissioner Farrell: Well, I guess probably you have unintentionally overstated what the Supreme Court held, in 145 U. S. 263. The Supreme Court held although both rates might be reasonable, still there might be unjust discrimination between them.

Mr. Cronk: Yes. But I did not intend to state that. I said both rates occupying the same position in the zone of reasonableness, there could be no violation. In other words, both rates, maximum reasonable rates, there could be no violation of the Act.

Now, there has been a good deal said on brief about the southern man getting into this territory on rates that are higher than the rates in Central Territory. Mr. Norman had a good deal to say about that, and he cited a number of cases to prove his point. One of the cases he cited was the paper case. I don't remember the title and citation, but it is where some paper mills in the North filed a complaint charging the rates on paper from the South to the North were preferential to the southern producer, and the [fol. 669] Commission dismissed the case, held that they were not.

Well, in the first place, Mr. Norman thought that case held that if a southern man was getting into northern territory on the same basis the rates apply in the North, that the Commission had found in connection with paper rates that that produced no situation of undue prejudice.

Well, of course, that is not the question in this case at all. The question in this case is not whether the Commission is going to prevent the southern man getting into the northern territory on rates no higher than rates in Central Territory, but the question is, do rates which are somewhat higher than the Central Territory basis, do those rates, when they are published and suspended in some way violate the Act?

Now, that is an entirely different question than to say that if they were on the Central Territory basis they would not be prejudicial. The Commission only deals with the rate it has before it, and the suspended rate is the rate the Commission has to look at, and it is, does that rate regardless of its level, does it violate in some way some section of the law?

And to say that other cases in which they have held a different situation did not violate some section of the law does not answer this problem at all. But as to the paper [fol. 670] case, when you analyze the paper case you will find it is rather difficult there to compare rates because the rates from the South to the North were blanketed from the Mississippi River to the Atlantic Ocean, big wide groups, and they were blanketed on the north end from Evansville

to Chicago. But the Commission did say when you got the rates down and compared them on averages, with the rates in the North, that they were considerably higher than rates in Central Territory, and that was probably the reason the Commission held that they did not create any preference to the southern shipper.

Commissioner Lee: Do you think the northern shipper is unduly prejudiced by having the commodity to move into the North at the same level he takes in the North?

Mr. Cronk: Yes, I think he is. I think in a competitive situation of that kind the Commission could not overlook the transportation conditions which the southern shipper has to encounter in reaching this territory. In other words, transportation conditions ought to fix the measure of the rates. If one man is able to encounter difficult transportation conditions at less rates than are maximum reasonable, and another shipper, although he may have more favorable transportation conditions, has to pay the full maximum basis, why I think it creates a situation of undue prejudice where there is competition.

[fol. 671] Commissioner Lee: Suppose I amend my question by adding, if the southern carrier is willing to haul his stuff to the river at the same rate which prevails in the North, would there still be a case of undue prejudice against the northern shipper?

Mr. Cronk: You mean if the transportation conditions were not reflected in the rate, but reflected in the divisions?

Commissioner Lee: No, I am not talking about divisions. I say if the southern carrier is willing to haul the commodity to the Ohio River at the rate that prevails in the North, at the level that prevails in the North, has the northern shipper, is he prejudiced by that fact?

Mr. Cronk: Why, yes. If the rate itself is lower than it should be on the basis of consideration of transportation conditions, the mere willingness of some carrier to take a less rate does not affect a question of undue prejudice.

Commissioner Tate: What do you understand is the basis for the Commission allowing higher rates to be charged where there is less density of traffic? Isn't it for the benefit of the road that has to go through that territory where there is a less density of traffic?

Mr. Cronk: That may be true.

Commissioner Tate: Suppose that road is willing to waive that penalty, and the——

[fol. 672] Mr. Cronk: Well, may I ask this: Who does he waive it in favor of?

Commissioner Tate: He waives it in favor of the patrons of his line situated there.

Mr. Cronk: Of his shipper, that is right.

Commissioner Tate: But the southern patron was never figured in the basis of the Commission in allowing higher rates to be charged in a less dense traffic territory. It is for the benefit of the road that has to run through there. Now, the road will say, "I will be better benefited by waiving that penalty in my favor to help build up my patronage."

Mr. Cronk: That is true, if you are having a controversy with a railroad, that may be all right. But when you come to the question of undue prejudice you will leave out of consideration the railroad, and then you are looking at the situation of the shipper. Now, let us take for illustration, suppose on account of light density a rate in the South should be $1.00, and a rate for a similar haul in the North should be 50 cents. Now, if the southern fellow is competing with a northern man, and he is accorded a rate of 50 cents, then he is getting his transportation at half price, and the North fellow is paying full price for it.

Commissioner Tate: Well, would you say he should, or [fol. 673] would you say, maybe that rate down there—you cannot exist unless you are allowed to charge more, you are allowed to charge more and the other man is not allowed to charge so much, because he will make a reasonable rate of return for his carriers by reason of the density of traffic.

Suppose, in managerial discretion, a road, down in the territory, there has been less density of traffic, would it not be better benefited by not insisting on the benefit? It is better business for me, I am not thinking of my patronage, but it is better business for me to waive it. Now, the basis of making the carriers take it——

Mr. Cronk: Well, now, let us take the South out of consideration. Let us take two shippers in the North where they are shipping to common markets, and one railroad charges maybe $1.00 a ton, which we will say is fair, and that is what the traffic ought to bear, and he charges his competitor 50 cents a ton. Now, he says, "I am willing to give it up. I think I can increase the tonnage from this

other fellow if I reduce my rate from, maybe, 50 cents."

Commissioner Tate: Of course, that would be a straight rebate as between two men in the same territory.

Mr. Cronk: Well, it is a straight case of undue prejudice. What difference does it make if one shipper happens to be in the South and the other in the North? Isn't the principle exactly the same? If he is giving away something [fol. 674] to the shipper, if the railroad company is yielding to the shipper something that he has a right to demand, he certainly is creating preference in favor of that shipper, whereas he joins in rates to the North where he demands the full measure of the rate, it seems to me that there is undue prejudice in that sort of a situation.

I just want to say this before closing. I want to reserve the rest of my time.

You have got this difficulty in this case. It is true, as you say, that a carrier may yield something in his rate to his shipper if he does not create undue prejudice by so doing, but he can't do it in this case because his rate is a joint rate, and the southern man can't yield the joint rate where one party to the joint rate is not willing to do it, because carriers publishing joint rates speak with one voice with reference to their position on through rates, and you cannot talk about it. It doesn't make any difference, because it is no money out of the northern carrier's pocket on the divisions, but it is taken off of the southern man, and all that sort of thing. But the fact remains that the Commission's jurisdiction in that sort of a situation is controlled solely by the consent of the carriers who are before you, and if one carrier fails to consent without any representations as to why he refuses to consent, you have no power to require them to go below the basis of the maximum [fol. 675] reasonable basis, and you cannot do it here, because the northern lines are not consenting to go below. It is just like the ownership of joint real estate. One man can't sell it. If you and I own it jointly, you cannot dispose of it, I cannot dispose of it. We speak together on that. We both can do it.

And so it is with a joint rate. It is a contract by which the Commission cannot compel or even consent to a reduction in the rate if both parties to it are not before you saying yes, it is all right.

That, I think, somewhat answers your Honor's question.

I want to reserve the rest of my time.

Commissioner Tate: This would not interfere with your time, by suggesting a different view of the law. As you state it I do not accept your view, that the Commission has no power to make another man join in a rate whether he wants to or not, if he is not hurt.

Mr. Cronk: Well, I say if it is compelling the maximum reasonable basis, which the Commission has prescribed, you can remove undue prejudice. I am taking out of that the question of undue prejudice.

Argument of Mr. H. A. Hollopeter

On Behalf of Indiana Consumers' Gas Company, et al.

Mr. Hollopeter: If the Commission please, I perhaps [fol. 676] will touch very briefly on some of the points that the two former gentlemen have covered, to bring my argument down to where I want to start out.

We have in this case, as they have already told you, a general readjustment of rates throughout Central Freight Association Territory, from Central Freight Association to Western Trunk Line, and from Southern to Central Freight Association Territory.

What happened there was that the Commission prescribed a maximum reasonable basis of rates for Central Territory, designated as Scale 2, and in the same identical case prescribed another maximum reasonable scale designated as Scale 3, to apply from Central Territory to Western Trunk Line, and from Southern Territory to Central Freight Territory, to or from the higher rated territories into Central Territory.

That Scale 3 basis is approximately 10 per cent higher than the C. F. A. scale. The Commission has said why they made it on that basis, and I think they were justified in so doing. That, in fact, as has been pointed out, follows very closely and consistently what the Commission has almost always done in the past, and in fact, where they have done differently you will find the prevailing reasons why they did not follow the usual practice.

Now, we came to the application of that decision in these [fol. 677] rates, and the northern carriers applied the maximum basis prescribed by the Commission throughout their

territory. With a very few minor exceptions, which are not involved here, they are not even complained of by other northern shippers. Those changes went into effect on March 15, 1934, and as to the northern rates, there were many increases as well as reductions in the former basis of rates. It was a general readjustment of rates, and the northern shippers took the bitter with the sweet.

As a matter of fact, from Terre Haute, the increases that we received in that adjustment in March, 1934, practically eliminated our plant from the markets of Indiana and Michigan, into which we had been shipping and selling theretofore.

Now, that was one of the bitter parts which we had to take, and we did take. Now, at that same time, the southern carriers in revising their rates from the South applied the maximum basis to the extent that it would give them the sweet, reduced the rates from the South to the North, but refused to increase any rates that might be below their scale. Now, I want to give you that picture of just what is involved, I think, in this proceeding.

It is not the overhead rates from the South to the North, that are involved as a whole. Mr. Cronk has referred to the fact that it is a very few—in fact, the tariff carrying the rates from the Alabama producing points to Central Terri- [fol. 678] tory, the tariff itself which went into effect in March of this year carried 12,714 destinations in Central Territory. Now, out of those 12,714 destinations, the supplement to that tariff which is all that is under suspension here, so far as that tariff is concerned, carries but 1,851 rates, so that less than, or rather, I would say, more than 85 per cent of the overhead rates from the South to the North are today on this maximum basis, the Commission prescribed. The rates are in effect. They have not been complained of by the southern shippers, and they are moving the traffic.

Commissioner Meyer: Does the record state about what that is in per cent or volume?

Mr. Hollopeter: Of the tonnage?

Commissioner Meyer: Yes. You have the number of points there, but what is the total volume?

Mr. Hollopeter: No, Mr. Commissioner, I don't believe there is anything in the record as to that. I think there was no survey of that kind made. There are large tonnages move on rates higher than the scale, and the rates that are

involved here. The few rates that are under suspension, bear in mind, are not the only rates that have been moving tonnage from the South into C. F. A. Territory. The great vast bulk of the rates that are on the maximum basis are on the scale prescribed by the Commission, do move [fol. 679] much more tonnage than these involved under the suspension.

Mr. Norman: Is there anything in the record to support that statement, Mr. Hollopeter?

Mr. Hollopeter: Yes.

Mr. Norman: I would like to have you refer to it.

Mr. Cronk: That tonnage moves on rates higher than the scale.

Mr. Norman: The vast majority.

Mr. Cronk: You have exhibits that indicate it. I don't know about the major, but substantial tonnages.

Commissioner Lee: Proceed, Mr. Hollopeter.

Mr. Hollopeter: Now, we are in this position here at this time, that as to the general structure of overhead rates in the South, they are on a basis fixed by the Commission, and the universal rule has been, of course, that that forms the best measure to test the lawfulness of the entire rate under substantially similar circumstances and conditions.

Now, these few rates under suspension from the South to the North, the transportation conditions surrounding those movements cannot be substantially dissimilar to the movements to all the other points in C. F. A. Territory. As a definite illustration, we take the rate from Birmingham to Elkhart, Indiana. The New York Central Railroad, the Big Four Lines, is the direct route from Indianapolis to [fol. 680] Elkhart. It is also the direct route from Louisville to Elkhart, which would handle the Birmingham tonnage most consistently, I would say would perhaps be the shortest route, the through logical route at least.

Now, the New York Central Railroad has published the Indianapolis to Elkhart rate on the maximum basis prescribed by the Commission as reasonable on a reasonable maximum basis. They were faced with the fact that, I think, they would be violating Section 3 had they continued to join, as the southern connections insist they should, in a rate from Birmingham to Elkhart, in which they would move the tonnage from Louisville to Elkhart, that was lower than the same relative basis in effect over their line locally

from Indianapolis. Indianapolis is a producing point competing with Birmingham in the market.

Commissioner Farrell: When you say lower you mean——

Mr. Hollopeter: A lower relative basis, yes sir, Mr. Commissioner. To illustrate, the rate from Birmingham to Elkhart today is $4.65 for 651 miles. That is the present rate continued in effect by virtue of a suspension. Now, take the rate from Birmingham to Aurora, Illinois, a very comparable destination in C. F. A. Territory. The distance to Aurora from Birmingham is 653 miles as against 651 to Elkhart. The rate to Aurora today, which is typical of this vast majority of overhead rates, is $4.80 against $4.65 for [fol. 681] an equal distance to Elkhart, and that is typical of the situation that we find in this suspension.

Now, the protestants have said a great deal here in this record about the coercion of the northern carriers upon the southern carriers. I think that is not important. But I think we have also shown, I think it is a fact, that the northern carriers were faced with this situation, and I know that the northern shippers complained bitterly to them of the situation, that they were actually forced by the southern connections to cancel their concurrences in these overhead rates that were proposed to be held lower than a maximum reasonable basis so long as they maintained a maximum reasonable basis in their territory or else they would be guilty of a violation of Section 3.

Now, it is very fine for the southern carriers who are out beyond the reach of Section 3 in that instance, I think, to say to the northern connections that you must go ahead and do this, when the northern carriers would perhaps be the only ones that could be guilty of violation of Section 3 because the southern carriers are out beyond, and have no control over the rate from Indianapolis to Elkhart. That I think is the situation which confronted us northern carriers, and I know that the northern shippers felt very strongly that there was prejudice in that situation.

Now, as to the Illinois rates——

[fol. 682] Now, as to the Illinois rates that are lower than the maximum scale, it is true that many of them are not involved here in this proceeding. That, of course, will have to be the subject of another proceeding, if there is any illegality in those rates. It is not a question here, of course,

of the northern shippers having felt the same about those rates in Illinois that are lower than the maximum basis, as they do about the rates in the rest of Central Freight Association territory that we are discussing here, but if we felt that way, our only recourse would be, of course, a further proceeding at the proper time to take care of those rates if they are unlawful, but that is beyond the issues here.

Now, I just want to make this further reference in connection with this situation: The Commission has often held —and I think it is sound reasoning—that while the carriers for competitive or commercial reasons—that is what is involved here or what is urgent here—may of their own volition disregard differences in conditions in fixing their rates, but an order from this Commission requiring them to do so is an entirely different matter.

Respondents contend that the maintenance of these present lower than maximum reasonable rates would create prejudice. Aside from that, however, we must consider a legal question. In Galveston Commercial Association versus Abilene & Southern Railway Company, 109 I. C. C., 114, you said at page 125:

[fol. 683] "It is true that the Commission has often held 'Carriers are left free to ignore differences for competitive and other reasons so long as they do not unduly prefer one locality or maintain rates so low as to burden other traffic. Maritime Association, Boston Chamber of Commerce v. A. A. R. R. Co., 95 I. C. C. 539. But an order from us requiring them to ignore such difference is quite a different thing'."

In this instance none of the protestants, either carriers or shippers, took the position that the rates under suspension were unreasonable. They all admit that the basis shown upon which these suspended rates are fixed was prescribed as a reasonable basis by the Commission.

Throughout the testimony of all protesting witnesses was the underlying contention that Southern producers must have rates lower than those under suspension in order to compete with their Northern competitors in these markets. They offered no testimony and none could give any reason why they should have lower rates from their producing points to these particular Northern markets than they now have as fixed by the Commission and in effect to all other

Northern markets similarly situated. Neither would they offer any reason why they should have this more favorable treatment than their Northern competitors to these particular destinations when both are, in the obvious conclusion of the Commission, given equal rate treatment to all other Central Freight Association destinations.

[fol. 684] In this instance, however, it must be remembered that carriers involved in this proceeding do not desire to ignore differences in transportation for competitive or any other reasons. It is true that some of the carriers do, and under the above principle, so long as they are fixing their own local rates, and so long as they do not unduly prefer one locality they may adjust their rates as they desire with the aforesaid restrictions only.

In this situation, we have an entirely different condition. If the Commission should here permanently suspend these rates, it would in effect and actually, be ordering carriers, against their will, to ignore such difference, which they very aptly say "is quite a different thing." There is nothing unusual in the condition herein in the carriers failing to agree on the basis of their joint rates. Whenever joint rates are involved their establishment is a matter of agreement between the carriers involved, of course, with the mandate that they must establish and maintain joint through rates.

Had both the Northern and Southern carriers, or all carriers parties to the rates under suspension joined freely in the desire to maintain lower rates, then obviously the matter would be such as referred to above, where the Commission might leave the carriers free to ignore the differences referred to and establish lower basis relatively from the South than within the North so long as they did not [fol. 685] prefer one locality.

The burden, therefore, would have been upon the respondent shippers, to show that the rates desired to be maintained, as illustrated by the present rates desired to be maintained by the Southern carriers only, would unduly prefer one locality. The question to be determined by the Commission would have been whether the respondents would show the rates unduly preferred one locality and if not it would have no objection to the carriers doing so.

However, we again insist that the situation involved here is not one wherein the carriers (all of them) propose to ignore differences but where a substantial part of them are

resisting the efforts of the others to ignore such differences. To sustain the Southern protestants, both carriers and shippers in this matter would be tantamount to the Commission's ordering the Northern shippers in their participation in these overhead rates to ignore such differences.

While it is not the position of respondents herein that the Southern producers have no right to endeavor to market their coke within this highly over-produced Central Freight Association territory, it is their contention as must be observed from the evidence of record, that there can be no commercial, competitive or marketing condition existing to justify any more favorable rate treatment to be given to these Southern producers than to their Northern competi-
[fol. 686] tors in these Central Freight Association markets.

Furthermore, the evidence in this record shows that the cost of production of coke is materially less for the principal respondents herein in the states of Alabama, and Tennessee than is the cost of production to the Northern competitive respondents. One of the principal arguments urged by the Southern respondents was that their long distance from these Central Freight Association markets should be the cause of favorable rate consideration on their coke.

The situation is not at all unusual in this respect in that any producer who locates near their source of raw materials naturally has lower production costs but must expect higher transportation costs in delivering their products, and conversely, a manufacturer or producer locating nearer his markets has correspondingly higher cost of production because of the farther distant location of his raw material. Nothing unusual in this situation portrayed by the protestants can be urged as indicating the need for more favorable rate treatment in their coke structure than that to be given their Northern competitors.

Protestants endeavored to show further the respective price yield for By-Product coke at their own ovens and at the ovens of their competitive respondents. It is true that these tabulations show the average oven price of the Southern producers to be somewhat less than is shown to be their
[fol. 687] average cost. The same statistics show the average oven price of the northern competitive respondents to be lower than their average oven cost by even greater amounts.

We submit this does not indicate any legal or proper basis for the Commission to consider more favorable freight rates for the southern producers, transportation and all other proper conditions considered, than for the northern producers into these northern markets.

Now, the northern carriers and the northern shippers—particularly the shippers—I want to say are not insisting or not asking this Commission to fix any rates from Birmingham or the south into Central Freight Association territory to keep southern shippers out. We admit that they have a right to get in here on the same relative basis we have, and when I say relative, I mean the Commission should give every due consideration to all conditions surrounding their rates to the same extent that they have considered conditions surrounding our rates, and when that is done, if we cannot meet their competition, that is not the Commission's fault, but for the Commission—as you are asked to do here—to give them rates entirely in disregard of certain conditions surrounding their movement, in a greater degree than you have in our movement, then, we contend we have been prejudiced.

Argument of William W. Collin, Jr.

On Behalf of the Diamond Alkali Company

Mr. Collin: If the Commission please, there is just one [fol. 688] condition that I want to emphasize, if I can, rather briefly, and it rests upon the fact that not all of the Central territory destinations are involved in this case; now, all of the rates from Birmingham to Central territory are not in issue here. A clear line of demarcation must be kept in mind, I think, between those rates which are in issue and under suspension with regard to which the Commission may, in this particular proceeding, make its finding or order, and the rates, on the other hand, that are not under suspension. They are not subject to complaint, but they are in force and in effect and are published in tariffs, and absolutely in no way involved in this proceeding.

Now, let me illustrate from a few particular rates just what the significance of that distinction is, between rates that are here involved and those which are not.

Hamilton, Ohio, is a short distance north of Cincinnati; some 20 or 25 miles; that is its location. It has today a rate of $4.25 from Birmingham on coke; that rate is the

scale 3 rate prescribed by Division 4 and published effective March 15, last, by the southern carriers.

Now, that rate, I think, stands definitely and, so far as this case is concerned, permanently and irrevocably because it is not in any way at all in issue.

Let's go further up into the state of Ohio, to Lima. Lima is just 100 miles beyond Hamilton; Hamilton is directly [fol. 689] intermediate; they are both served by some of the same carriers; that is, there are lines in common at both points. The scale 3 rate to Lima, which is under suspension, and which is here involved and in issue, is $4.55. The present effective rate; that is, the one that has been published for a long time, is what the northern lines and shippers say is a depressed rate, and it is in force and effect now by virtue of the suspension of the scale 3 rate of $4.55; that present effective rate is $4.40.

Now, in regard to that, the Commission, of course, has it within its power, if it wants to; if it feels it is justified, to say that this suspension must be made permanent and that that $4.40 rate cannot be raised. Further, I might state, the contention of the southern lines and shippers that Lima, like all other points, ought to have the scale 2 or Central Freight Association basis; that basis would make to Lima a rate of $4.15, and so we would have, if we take the southerner's contention, a rate of $4.15 to Lima, 100 miles north of Hamilton, and a rate 10 cents higher—or $4.25—to Hamilton, which rate has been prescribed by the Commission, is in force, and is not here in issue.

Commissioner Farrell: I want to be sure I understand this case, and I would like to have you correct me if I am not correct: Speaking of the rates from the south to the north—those that are not here in issue, and those that were put into [fol. 690] effect in accordance with the order of Division 4 in I. & S. 3511——

Mr. Collin (Interposing): Yes, sir.

Commissioner Farrell: Those that are now before us for the determination of the question of whether or not the column 3 basis should be applied to them in accordance with the tariff suspended; those that were lower than the rates prescribed by Division 4, and that the southern carriers did not put into effect in accordance with the decision of Division 4.

Mr. Collin: Yes, except——

Commissioner Farrell (Interposing): I want to go one step further: There are other rates not before us now, and

those are rates of the Illinois Central, the Chicago & Northwestern, the Chicago & Eastern Illinois, and the Burlington, which I understood Mr. Hollopeter to say were left to be straightened out in some future proceeding, if at all.

Mr. Collin: That third group is not in issue here—I say not in issue—I don't mean they are not before you as a part of the testimony, but if they are not under suspension, nothing can be done.

Commissioner Farrell: I understand they are before us as a matter of record; that is, the people who are objecting to the suspended rates being made effective are saying that if they are made effective there will be an unlawful discrimination between them and those who paid lower rates that I [fol. 691] mentioned that are not before us in this case. Is that correct?

Mr. Collin: That is correct, sir. Now, I think perhaps I have made myself clear as to just what my claim is here: That unless the Commission shall treat this suspension proceeding as what it is not, and make of it a general investigation. I can't see how, in spite of all the arguments, which are just like the arguments in old I. & S. 3511—I don't see how the suspended rates can fail of taking effect; I don't see how this old lower and depressed basis of rates can stay in force in the face of the fact that we have prescribed rates on scale 3.

Still less do I say there would be any reasonably justifiable rate structure to accord to the southern interests—scale 2 or the Central Freight Association territory basis from Birmingham into this territory, in the face of the fact that to a number of points, scale 3—a slightly higher basis—is already in effect and is not in issue, and in no way that I know of can be touched by the Commission in this particular proceeding.

It seems to me in this case, the decision originally made in I. & S. 3511, by virtue of having been put partially in effect, and nothing to the contrary throughout the territory is in effect, is, as a matter of practical rate construction, controlling of the issues in this particular suspension case covering those points to which the carriers have not yet succeeded in making effective the basis prescribed by the [fol. 692] Commission.

Chairman Lee: Mr. Mohr, you are next.

Mr. Mohr: If it pleases your Honors, I have arranged to have Mr. Gwathmey precede me.

Argument of Mr. R. B. Gwathmey, on Behalf of the Nashville, Chattanooga & St. Louis Railway Company and the Southern Railway Co.

Mr. Gwathmey: May it please the Commission, I appear in this proceeding for the Nashville, Chattanooga & St. Louis Railway, and the Southern Railway. We are both respondents and protestants, but we are reluctant respondents, one of my predecessors to the contrary notwithstanding.

We are placed in the position of being respondents from the fact that our northern friends would not join us in rates as low as we thought they should go, and they, at the same time, declined to continue under the present basis. We had no other recourse than to present the matter to this Commission and to ask this Commission to adjudicate our rights as far as you can do so in this proceeding.

As pointed out by one of the preceding gentlemen in answer to a question by Mr. Commissioner Farrell, some of the northern lines themselves are not in accord with this proposal.

Now, these protestants; that is, the two for whom I speak, are in full accord with the position of the northern lines that the suspended rates are not unreasonable per se. They are also in accord with the position of the northern lines [fol. 693] that normally the southern territory is a higher rated territory than initial territory and might normally take higher rates. Their objection to the proposed scale or to the suspended scale is primarily one of relationship.

They aver specifically that the suspended rates would be certainly in violation of the spirit of Section 15-A which requires this Commission to take into consideration the movement of traffic, and they aver specifically that the suspended rates would be particularly in opposition to Section 3, and therein this Commission has ample authority to adjust the rates so as to not violate the Sections of the Act in any respect.

These respondents take the position that a reasonable basis or a fair and just basis to be applied on this traffic is so-called scale 2 of Appendix 8 of the coke case; that is equivalent to a distance scale and these lines and their patrons feel that that is a proper basis to be applied in order to put everybody on a fair basis.

As pointed out in the coke case, coke is a highly competitive commodity and is a relatively low grade commodity; to that extent it is more sensitive to rate disparities than would be some higher grade commodity. It is produced extensively in official territory and in Illinois Freight Association territory, and the producers in that territory and the producers in southern territory, particularly Birmingham, and Alabama, and Tennessee come in keen competi- [fol. 694] tion with each other in the official territory.

The northern producers already have the advantage of distance in that the hauls from their producing points are much shorter than from those points in the south.

Now, the scale proposed by the southern lines, namely, scale 2, is, I think, from 30 cents to 45 cents per ton lower than scale 3 advocated by the northern lines. Let us see what the result is, using Detroit as a destination; that is, I understand from the record, an important consuming point—from Hamilton, Ohio, to Detroit, the distance is 233 miles and the present rate is $2.55—the Central Freight Association territory rate.

The suspended rate from Chattanooga for a distance of 592 miles to Detroit is $4.55, so that under the suspended rate, the Chattanooga producers, in seeking to sell in Detroit, would have a disadvantage of $2 in the rate as against the Hamilton producers.

Commissioner Meyer: Is there an important volume of production at Hamilton?

Mr. Gwathmey: So I understand, and I think that is representative of the differences that would occur, yes, sir. It is particularly occasioned by the difference in distance with the attendant 30 or 45 cents per ton higher rates of the interterritorial scale.

[fol. 695] Now, taking Birmingham as an illustration: From Birmingham to Detroit the distance is 735 miles and the suspended rate is $5, or $2.45 higher than the Hamilton rate. Scale 2, as advocated by the protestants, would make from Birmingham to Detroit a rate of $4.55, or $2 higher than the Hamilton rate.

So, we have a substantial rate disparity which is accentuated by the distance; you have keen competitive conditions. In so far as the northern lines are concerned, you have similarity of transportation conditions; in the short portion of the haul that is performed within official territory——

Commissioner Farrell (interposing): I don't want to disturb you, but I want to understand this case. If I understand correctly, the remedy to be applied by the Commission in this case is to require the carriers to remove a violation of Section 3—am I right?

Mr. Gwathmey: Primarily, yes.

Commissioner Farrell: Let me ask you this: Division 4 prescribed from the south to the north what is known as column 3; it has prescribed in central territory what is known as column 2, and column 3 is about 10 per cent higher than column 2 for the same number of miles—is that right?

Mr. Gwathmey: I so understand, your Honor.

Commissioner Farrell: Now, you say under section 3 we should require the northern carriers to join you in a scale which would be as low as scale 2 from central territory?

[fol. 696] Mr. Gwathmey: Yes, sir.

Commissioner Farrell: My trouble is that the Supreme Court has said that when we operate under Section 3, we must leave the carriers an option, either to raise the lower rate or to lower the higher rate, or do a little of either. How could we do that and still remove this discrimination by requiring the northern carriers to reduce the rates from the south to the north?

Mr. Gwathmey: I appreciate the force of what your Honor says, but I will go a little further and call on your powers under Section 15-A. I might say, so far as Section 3 is concerned, that the northern carriers participate in both sets of rates—the northern rates and these suspended rates, and in that respect you have a perfect case under Section 3. In applying the remedy, I appreciate the difficulties your Honor has pointed out, but I think you could very properly say that the rates from one territory should be no higher than the other, and leave it to the carriers to adjust it probably in line with what this Commission shall consider a reasonable basis.

Now, the defense on the charge of undue prejudice is primarily that the difference in transportation conditions in the south warrant a higher basis from the south. Well, we submit that that is a defense which would inure to the benefit of the southern carriers, and if they wish to waive that defense, that is up to them; certainly, it should not [fol. 697] inure to the benefit of the northern carriers.

In other words, we feel that the northern lines, although under the guise of trying to get you to fix a reasonable maximum basis on scale 3, *or* doing nothing more than building a wall around their producers. We want to try to look out for our producers also.

Now, another question might arise; there might be some question under Section 3, and that particularly from the standpoint of the connecting carriers. These northern carriers join in those lower rates with their northern connections, but they refuse to join in rates with their southern connections on the same basis. It would appear that there might be some question under Section 3 as to whether or not they are guilty of some discrimination against their connections.

Now, it is clearly obvious, if I understand the record in this case—and I am not going into that feature very fully because other gentlemen following me, I am sure, will touch on it—we might feel that those rates will stifle the movement from the south to the north. In that respect they should be subject to very keen scrutiny by this Commission under the plain mandate of Section 15-A; certainly, the Commission should not approve rates under any circumstances which will not move the traffic, and it is stated here on this record that those rates will not move the traffic. That is because of competition.

[fol. 698] Now, we submit that when competition comes into the picture and all of those other elements which normally are considered in fixing reasonable rates, you have a perfect picture. Compelling competition minimizes a mass of those other matters and it might reasonably undermine a rate which, in every other respect, is entirely reasonable. So we say that this Commission has ample authority under the Act to regulate those rates in a way in which we ask that they be regulated. The provisions of Section 3 and the more general and wider powers of the Commission under Section 15 clearly contemplate the situations of this kind.

Now, I might say before going further that something has been said as to whether or not this Commission is bound by the decision of Division 4. While something has been said as to the fact that the Commission in that connection prescribed rates from the south on a certain basis—as I understand that case, the Commission only fixed a maximum basis from Birmingham; nothing was said about Chatta-

nooga or any other point in the south. In that order they did not require the observance of those rates as minima and did not say that the carriers had to observe those exact rates; it simply said: "The carriers shall not exceed those rates."

Commissioner Tate: That was one of the points discussed by Mr. Collin; the point made by Mr. Collin about the apparent discrepancies illustrated by Hamilton and Lima. [fol. 699] Some of you will discuss that, will you?

Mr. Gwathmey: If your Honors please, I am not in a position to say what should be done as to those other points here. The position of the southern lines is that this scale 2 should be applied from the south to all that territory and, whereas you might not be able to reach those reduced rates in this particular proceeding, that in some subsequent investigation they ought to be adjusted in line therewith.

But some question arises with respect to those carriers who have not joined in the scale 3 rates. If that situation, as a result of what is done here, might create some disparities, that ought to be corrected in some subsequent proceeding. I think here we are bound by the issues unfortunately decided as to those particular rates that are before you, but I say this: Scale 2 ought to apply to all this territory. That scale 2 is not unreasonably high seems to be generally conceded. It is clearly shown by the fact that the Commission prescribed basis 3 as a maximum—a higher scale. That it is not too low is illustrated by the fact that in the record there are comparisons which show that those scale 2 rates would yield considerably more revenue than other similar low-grade commodity rates.

Moreover, scale 2, as I understand, is substantially in effect in southern territory as well as in official territory. I don't think that there is any complaint, as some one has [fol. 700] stated, that those scale 2 rates are too high or too low under Section 1; it is purely a question of relationship.

Now, on commodities which are subject to keen competitive forces, such as coke, this Commission has frequently approved rates interterritorially on the same level as the destination territory; that is, mile for mile. In those cases, the Commission has held, or has recognized the principle, that compelling competition necessarily diminishes the importance of such things as traffic density, rate level, operating conditions, and so forth.

I might say further, in respect to this question of traffic density or rate level between the two territories, that the record indicates that although southern territory may be a higher rated territory than official territory generally, as to coke that is not true, and the level on coke in the south is just about the same as the level of rates in official territory.

Now, turning to some of those cases in which the Commission has considered the very same question, we find as follows: In the case of American Distilling Company versus A. C. & Y. Railway Company, 140 I. C. C. 633, the complaint assailed the rates on denatured alcohol from Pekin, Illinois, to official territory as being unreasonable per se and also as being unduly prejudicial and preferential as against the New Orleans rate to the same territory.

[fol. 701] The Commission found that the rates were not unreasonable per se, just as we have in our case here, but they did find that it would be unfair, on account of the competition which surrounded that commodity, to apply different rate levels to such territory from New Orleans and from Pekin, although in two differently rated territories, and in that case the Commission said:

"Ordinarily, rates to the most important consuming territory here considered should be relatively somewhat higher from New Orleans than from Pekin due to the long haul from New Orleans through the higher rated southern territory. However, in view of the fact that denatured alcohol produced at New Orleans must move some 800 miles before it reaches the territory of largest consumption, and the sharp competition"—they emphasize the "sharp competition encountered in marketing alcohol in that territory, we are of opinion that New Orleans properly may be accorded rates which bear a somewhat more advantageous relation to those from Pekin than if the New Orleans rates were made in full consideration of the less favorable transportation conditions surrounding the traffic from that point; that a relation of rates from Pekin and New Orleans based solely on distance"—that is what we advocate here—"would remove any existing undue prejudice to Pekin or undue preference to New Orleans; and that to Central territory such a relation would be produced by observing the differ-

[fol. 702] ences in rates resulting from the application of scale 10, appendix K-2, Southern Class Rate Investigation,

to the distances from New Orleans and Pekin. This scale is selected solely because the rates produced thereby for the distances from Pekin to Central territory destinations closely approximate the present rates."

Now in the case of Krupp Foundry Company, versus Southern Railway Company, 148 I. C. C. 743——

Chairman Lee (interposing): What was the complaint in the Pekin case?

Mr. Gwathmey: He complained that the rates from Pekin were unreasonable per se. I said the Commission found the rates not unreasonable, but they did require them to be reduced to a lower basis on account of the competition. In the Krupp Foundry case, 148 I. C. C. 743, shippers in Pennsylvania and New Jersey assailed the rates on cast iron pipe and fittings from points in those states to destinations in official territory as unreasonable and as unduly prejudicial to them and preferential of producers at Birmingham, Alabama, and Chattanooga, Tennessee, and in that case—I am not going into it in detail—the Commission approved the same basis, mile for mile, to the destination territory, although it recognized the two territories were differently rated territories.

Now, another case in which the Commission has done the same thing is Hosiery from Southern Points, 156 I. C. C. [fol. 703] 117. The Commission approved first class rates in southern territory and authorized 75 per cent of first class to official territory, so as to put the interterritorial rates on the same basis, mile for mile, as the rates in official territory.

In the Newsprint Paper Investigation, 197 I. C. C. 738, the Commission disregarded the fact that class rates within the west and interterritorially were higher than the rates within central territory, prescribed rates on newsprint paper from that higher rated territory to central territory on the same basis as the rates within central territory.

In Consolidated Stone cases, 200 I. C. C. 65, the Commission again approved rates interterritorially on a parity with the rates within the destination territory.

Mr. Hollopeter: They were higher from the south to the north.

Mr. Gwathmey: I think it is the same case; you are thinking of the dressed stone. The Commission in that case took into consideration the competitive conditions that

surrounded that traffic and authorized a parity which normally would not have been justified.

Now, as I said, I have not time to go into those cases cited by the other gentlemen; we have cited cases to show you that this Commission has approved this kind of a proposition; they have decided some more or less unfavorable, but [fol. 704] the issues have got to be determined on this record, and we submit that on the record here presented it is shown that this traffic will not move into official territory on the rates suspended, and shows also that the southern producers will be at a disadvantage; the southern carriers will not get any of the traffic, and that the Commission should, in disposing of this matter, find that the suspended rates are not justified, without prejudice to the establishment of rates to this territory made on the basis of scale 2.

Argument of Mr. E. D. Mohr, on Behalf of the Louisville & Nashville Railroad Company

Mr. Mohr: May it please your Honors, I represent the Louisville & Nashville Railroad. The position of this protesting respondent is slightly different from that of the Southern and Nashville, Chattanooga & St. Louis Railway in that it is our desire to continue in effect the existing rates, whereas the other lines mentioned desire a finding prescribing the northern level or column 2 rates for interterritorial application from the south to the north.

My remarks will have to do primarily with the rates from the Birmingham district. The rate from the Wise County, West Virginia, ovens, which are located on the Interstate Railroad, will be dealt with by counsel for that line.

In considering this case it should be borne in mind that [fol. 705] the rates from the Birmingham group to the north are in no case higher than the column 3 maximum reasonable rates prescribed for interterritorial application by the Commission in the Central Coke case (I. & S. 3511), 194 I. C. C. 640. Nor is there any rate from the Birmingham district to the north that is lower than can be made on basis of the column 1 scale prescribed for application between points in official territory.

As the rates in no instance exceed the maximum prescribed, and as none is more than 10 per cent lower, they all obviously come within that zone in which a reasonable rate may lie, namely, somewhere between an unreasonably low and an unreasonably high level of rates.

The circumstances under which the suspended rates are published have been referred to by preceding counsel. The northern lines insist that these rates are necessary to prevent unlawful discrimination against shippers that they serve, who, they claim, are being charged maximum reasonable rates.

We take the position in this proceeding that the burden of justifying the increases to the north and of establishing the lawfulness of those increased rates is upon the northern lines, and that failing in that, the Commission should find that the suspended rates have not been justified and should be withdrawn. On the other hand, our associates take the position, as I understand it, that the Commission in this proceeding may properly and should prescribe the destination level.

[fol. 706] Commissioner Mahaffie: You filed the suspended tariffs.

Mr. Mohr: We filed them under protest.

Commissioner Mahaffie: Therefore, you shift the burden.

Mr. Mohr: To the northern lines. The reasons that the southern carriers published those rates—and the only reason—was that they were compelled to by the action of certain northern lines in withdrawing their concurrences in the existing rates, and in that connection I want to point out, with respect to the 54 northern lines, that no such action was taken, and as a result of their willingness to continue a competitive basis with the southern carriers, we were able to maintain our present rates to practically all Illinois points.

There are also several Central Freight Association lines —the Wheeling and Lake Erie and the Northern Ohio— which did not file non-concurrences, and those lines reach very important northern destinations, such as Toledo, Cleveland, Akron, Pittsburgh, Cadillac, Michigan, and various other very important consuming destinations.

Commissioner Mahaffie: Does the Northern Ohio file its own tariffs?

Mr. Mohr: No; the southern carriers file tariffs for all northern lines, but by reason of the fact that the major Central Freight Association lines form a necessary connecting link in the route from the south to the north, we were compelled to cancel the rates in connection with those [fol. 707] other lines, because if we do not make direct connection with them——

Commissioner Mahaffie (Interposing): I understood you to say that the Wheeling and Lake Erie and the Northern Ohio had not gone along with the other northern lines.

Mr. Mohr: That is right.

Commissioner Mahaffie: Does the Northern Ohio file a tariff of rates from the south?

Mr. Mohr: Not from the south. This has to do with interterritorial adjustments from the south to the north, and the present rates in connection with the Northern Ohio and the Wheeling and Lake Erie are published in the tariffs of southern carriers, and those rates have been increased because of the fact, as I just stated, that the Baltimore & Ohio, the Pennsylvania, and the Big Four, who form a necessary connecting link between the southern carriers and these northern lines have filed increases in the present rate.

Commissioner Tate: Do you take the position that the rates here suspended do comply with the order in I. & S. 3511?

Mr. Mohr: 3511?

Commissioner Tate: Yes; I. & S. 3511.

Mr. Mohr: No, sir; we take the position that there is no mandate in that order requiring the increases in the rates to the level of maximum reasonableness described in that case.

Commissioner Tate: They do come within the maximum level of reasonableness?

[fol. 708] Mr. Mohr: That is correct. The southern carriers contend that the mere charging of the same rate level from the south to the north as obtains in the north does not of itself constitute unlawful discrimination. Unlawful discrimination, of course, is a matter of proof. If the contention of the northern lines in this regard were sound, it would be impossible for any line to establish a competitive rate to a given destination unless it first determine whether the rates of its competitors were on a maximum reasonable level; and if so, it would be precluded from establishing competitive rates. The mere statement of the proposition reveals its fallacy.

The column 2 scale prescribed for application in the north, while designated a maximum reasonable basis of rates by Division 4, was determined upon after the northern lines and northern shippers presented much evidence regarding the competition that existed as between the

various producers in the north; and the level and the gradations were fixed with the idea of enabling northern producers to compete with each other for business in that territory.

If such is not the case, then obviously there is no necessity for the rates for the longer hauls. The scale provides rates for distances up to 800 miles. Manifestly the column 2 scale is in fact a competitive adjustment intended to enable all producers in northern territory to do business in that territory in competition with one another.

[fol. 709] The same is true of the column 3 scale prescribed for application from the north to points in western trunk line territory. This scale was prescribed for the express purpose of enabling the Ohio producers to compete with the Indiana and Illinois producers for business in western trunk line territory.

It is interesting to note that the coke scale prescribed by this Commission for application from central freight association territory to destinations in western trunk line territory averaged but 7 cents per ton higher than the western trunk line scale. This, to all intents and purposes, places the Central Freight Association producer on a parity not only with the producer in Illinois but with those located in western trunk line territory.

In the case of rates prescribed for application from the south to the north, the rates range from 15 to 45 cents higher than the destination level, the rates for distances in cases of 300 miles ranging from 30 to 45 cents higher.

Birmingham is approximately 400 miles south of the Ohio River, and the rates to Central Freight Association territory under the column 3 scale would in no instance be less than 35 cents higher than for corresponding hauls in the north and in most instances about $2 per ton higher than the rates from Central Freight Association ovens. In other words, the northern scale for 600 miles is $4.55, or $2.10 higher.

It is this scale prescribed for the purpose of meeting [fol. 710] competition at destinations in western trunk lines territory, that was arbitrarily prescribed as reasonable for application from the south to the north. The reason given for prescribing this scale was the alleged similarity of transportation conditions.

So we find a scale prescribed to meet competitive conditions in western trunk line territory arbitrarily prescribed as reasonable for application from the south to destinations in official territory where the competitive conditions are wholly dissimilar. A scale fixed for the purpose of enabling Central Freight Association producers to compete in western trunk line territory obviously will not enable southern shippers to do business in official territory.

I desire to emphasize the fact that this Commission in its decision in the Central Coke case specifically stated that insufficient evidence had been presented to justify a finding that the then-existing rates from the Birmingham district to the north were discriminatory. With the exception of the rates that were recently reduced so as not to exceed the maximum rates recently prescribed, the rates from Birmingham to the north in effect today are the same as those that this Commission had before it when it made that finding. Consequently, the latest expression of this Commission is that the present rates on coke from Birmingham to the north are neither unreasonable nor discriminatory. [fol. 711] In the instant proceeding, as in the former case, no evidence was presented that would support a finding that the existing rates from the Birmingham district to the north are discriminatory or in any other respect unlawful. It is true they are lower than the maxima prescribed but that does not make them unlawful.

Not a single northern shipper was able to show that he would suffer any undue prejudice whatsoever should the existing rates from the Birmingham district be continued in effect; nor for that matter were they able to show that the establishment of rates from the Birmingham district on a level no higher than prevails in the north would operate to their damage.

Due to the greater hauls and the very pronounced gradations in the scale for the longer distances, southern shippers under the northern scale would be compelled to pay considerably higher freight charges than do those shippers located in the north, the difference in the rates ranging, as stated by Mr. Gwathmey, from 50 cents to $3 per ton.

As the burden of proof to establish the lawfulness of the suspended rates was on the northern carriers, southern carriers expected them to submit proof to establish their contention that the existing rates would discriminate

against northern shippers and unduly prefer southern shippers. However, they elected to stand on the finding of this Commission.

As a consequence, southern carriers and southern ship-
[fol. 712] pers presented evidence that clearly establishes the fact that the suspended rates would operate to unduly prejudice southern shippers and that same would very materially affect their ability to do business in the north to their detriment and also to the detriment of southern carriers. As this evidence will be dealt with at length by counsel for the southern shippers who will follow me, I shall not anticipate them.

I wish to point out that while there is a slight difference in the position of this company as compared with that of the Nashville, Chattanooga & St. Louis and the Southern Railway, it is of no real consequence and has to do solely with the method of disposing of the instant proceeding. The Louisville & Nashville takes the position that the suspended tariffs have not been justified and should be withdrawn; whereas the other lines desire an affirmative order requiring the northern lines to participate in the establishment of the column 2 scale.

The southern carriers are as one in taking the position that the rates prescribed from the south to the north made on the column 3 scale do not receive maximum reasonable rates, but this Commission prescribed them only as maximum reasonable rates, and to be lawful, a rate must likewise be non-discriminatory such as to permit the traffic to move.

Now, in so far as the discrimination feature of those rates is concerned; that is, the present rates; we are not here concerned with the present rates, and whether they
[fol. 713] have been shown to be unlawful on the one hand, and, on the other hand, whether the northern lines have established the fact that the suspended rates are lawful. Division 4 specifically found with respect to the present rates, and the allegation of discrimination by the northern shippers that those allegations were rather general in nature and are supported in the main merely by the statement of the differences in the rates—where the question was dealt with in Mr. Hollopeter's brief, it is at best indefinite, and in our opinion insufficient to support a finding of undue prejudice.

As I said, the southern carriers are as one in advocating the following propositions:

First. That rates from the south to the north made on the column 3 scale would not be in excess of maximum reasonable rates.

Second. That because of the longer hauls involved from the south to the north and the highly competitive nature of the traffic under consideration, southern shippers cannot do business in the north on basis of maximum reasonable rates. In many instances we may as well charge full combination of locals.

Third. That rates from the south to the north to be unlawful must not only be reasonable but non-discriminatory as well. That the maintenance of maximum reasonable rates from the south to the north while the shippers in the north [fol. 714] enjoy a competitive basis results in unlawful discrimination.

Fourth. That in the establishment of competitive rates, distance considerations and transportation conditions must of necessity be subordinated to the need of establishing rates to meet the competition found to exist.

Fifth. That if the northern carriers, such as the Chicago & Eastern Illinois, the Monon, the Big Four, the Cincinnati, Hamilton & Dayton, and the other lines operating in a northerly direction from the Ohio River crossings, participate with lines operating in an easterly and northerly direction in maintaining competitive rates from the east, they should be required to join southern carriers in maintaining competitive rates from the south.

Sixth. That the action of individual northern lines in refusing to continue in effect competitive rates on a level corresponding with that which they join northern carriers in maintaining results in unlawful discrimination.

Seventh. That the northern lines, individually or collectively, cannot advance a sound traffic or transportation reason for refusing to participate with southern carriers in operating the destination level of rates on coke. That the principal reason advanced in this case, that is, the alleged discrimination is fallacious, and that the secondary reason the alleged adverse transportation conditions in the south is a matter that does involve them.

[fol. 715] Now, the thing that impresses me more than anything else in this argument is the assurance with which coun-

sel for the northern lines and the northern shippers approach the situation and the task here before this Commission as if they represent an individual line; as if the northern lines were one system instead of a group of individual lines operating in that territory. It makes considerable difference as to how you approach that question, and those lines as a group may not assert rights which they, as individual carriers, may not assert. I will come to that in a moment.

As stated, I will deal principally with the adjustment from the Birmingham district to the north. Now, in considering this question, as I have already stated, you have two propositions: One, to determine whether or not the present rates are unlawful, and the other, whether or not the burden of proof imposed upon the northern carriers under the law has been sustained in establishing the fact that those rates are not unlawful.

With respect to the Birmingham rates, they in no case exceed the maximum reasonable level prescribed by this Commission—the column 3 rates—and likewise there are no rates from the Birmingham district to the north that are lower than the destination level—the column 2 rates.

Now, inasmuch as the present rates are in no case higher than the maximum you have prescribed, and in no case lower [fol. 716] than the level in the north, which is approximately 10 per cent less, the present rates from Birmingham fall within a zone that a reasonable rate may lie—that is, within a zone that is not too high—unreasonably high—or one that is not exceptionally or unreasonably low. That is the situation we have with respect to the rates from Birmingham.

Now, there has been no contention here that the rates from Birmingham are not compensatory. The northern lines insist that it is necessary to increase the rates from the Birmingham district to the north up to the very highest maximum level in order to prevent discrimination against the northern shippers which they serve who they say are being charged maximum reasonable rates. Now, of course, the question of what is unlawful discrimination is a matter of proof, and with respect to the evidence that was presented in this case regarding that feature by the shippers, I have this to say, and I think it is obvious, that the mere charging of a corresponding or similar level of rates from the south to the north as prevails within the north does not constitute unlawful discrimination. If that con-

tention were sound—and that is practically the sole basis advanced by those northern lines for insisting that they were required to file non-concurrences——

Chairman Lee (interposing): Is unlawful discrimination and undue prejudice the same thing?

Mr. Mohr: Practically the same thing in this particular [fol. 717] case—we might concede that. If the contention of the northern lines in that regard is sound it will become necessary, before any carriers establish a competitive rate, for them first to determine whether or not its competitor was charging the maximum reasonable rate, and if that line discovered that its competitor was charging the maximum reasonable rate, it would be foreclosed from establishing a competitive rate. The mere statement of such a proposition reveals its absurdity to my mind.

Commissioner Farrell: Mr Mohr, I don't think you understood the question of the Chairman as you ought to because there is a wonderful difference between Section 2 and Section 3, according to the Supreme Court's decision in the White case, 167 U. S. 512, where they said:

"Section 2, under substantially similar circumstances and conditions, applies to the matter of carriage and does not include competition, but Section 3 does include the question of competition."

Mr. Mohr: Yes, sir; I really misunderstood the Chairman's question, but even on that score there is a possibility of the northern lines being in violation of Section 2 of the Act by charging shippers for the same identical service from the Ohio River crossings to Central Freight Association territory and insisting upon a higher rate than they exact from shippers in northern territory.

[fol. 718] Now, with respect to this scale—this column 2 scale—that was prescribed by this Commission—or by Division 4—and designated a maximum reasonable scale, I should like to point out that that particular scale was determined upon after exhaustive hearings—the hearings lasting several weeks, and as counsel for northern lines stated, there were voluminous exhibits filed, and there were a great many contentions on the part of the long haul shippers and the short haul shippers as to what the scale should be, and this Commission heard that evidence and had before it a competitive adjustment of rates in that territory that was

formerly in effect, and it was a competitive adjustment that moved many millions of tons of coke in that territory, and as a result of the evidence that you had before you, you prescribed a competitive adjustment of rates, and that column 2 scale is a competitive adjustment of rates that enables the shippers in the north to compete with one another for the business in that territory.

Now, if that were not true, there would be no occasion for the scale that you prescribed being extended to 800 miles; that will preclude all other shippers throughout that whole northern territory.

Now, the same is true with respect to the column 3 scale; in so far as western trunk line territory is concerned, that column 3 scale was prescribed specifically to take care of a competitive situation as between the producers of coke in [fol. 719] Indiana and Illinois on the one hand and Ohio on the other hand; it was to enable Ohio to compete with Indiana and Illinois in western trunk line territory.

Now, it is very interesting to note that the particular scale that you prescribed for application to the west is only seven cents per ton, on the average, lower than the level prevailing in the west. Now, as I have stated, this scale puts the Central Freight Association producer on a parity with the Illinois territory producer, but when you come to consider what shall be a proper adjustment of rates from the south to the north, you arbitrarily decided that the rates that were proper to meet competition as between Illinois and Ohio to the west would be proper for application from the south, and what is the result? You have prescribed a level of rates that for the distances that are involved range from 30 to 45 cents per ton higher than the rates that are paid by the southern shippers' competitors in the north.

Birmingham is approximately 400 miles south of the Ohio River, and the long haul in Central Freight Association territory will be 200 miles. The scale for 200 miles in the north is $2.35. To reach such a point from Birmingham would involve a haul of approximately 600 miles, and for that distance the rate under column 3 is $4.55, or $2.10 higher. Now, the difference in distance alone is a sufficient handicap to justify, or to take care of, the geographical [fol. 720] disadvantage of the southern producer. It would

appear to me that what the northern carriers and shippers desire is not that the geographical disadvantage of southern shippers be taken care of in this adjustment, but that the alleged competition which they have in the production of coke shall be reflected in the rate, and that the southern carriers be compelled to exact the very highest rate that they lawfully can be required to exact in order to overcome that difference.

Commissioner Meyer: Do you happen to have there the ton mile and car mile earnings covering that 200 and 600 miles illustration?

Mr. Mohr: I am sorry I do not have that with me.

Commissioner Farrell: That would be easy, in a way, by applying 10 per cent difference between column 2 and column 3.

Mr. Mohr: That would be easy?

Commissioner Farrell: I say it would be easy to reckon about what that difference would be by applying the 10 per cent.

Mr. Mohr: Yes; I did not think of that—that is correct—but, of course, there might be an additional difference due to the greater or more pronounced gradation in the scale for the longer distances that might affect it also, the shorter hauls being relatively long in the north as contrasted with the longer hauls.

Commissioner Farrell: I know; but as a matter of fact, [fol. 721] what you are asking for is not that the distance of 200 miles—that the scale for that 200 miles be applied per mile to the 600 miles.

Mr. Mohr: That is correct.

Commissioner Farrell: You are asking that the same per mile rate be applied to 600 miles from Birmingham to a point in Central territory as applies for 600 miles in Central territory.

Mr. Mohr: That is our position, yes, but I understood Commissioner Meyer to ask whether I had the ton mile and car mile earnings on those two destinations—200 versus 600, which I say I have not. Now, as I pointed out, Division 4 specifically stated that insufficient evidence had been presented to justify a finding that the then existing rates from the south to the north were discriminatory, with the exception of those rates—many of them—which are combination rates to points to which there is little or no movement—with the exception of those rates that were

reduced in order that they might not exceed the maximum reasonable level prescribed, the present rates in effect today are the identical rates which this Commission had before it when it made that finding; consequently, the very latest expression of this Commission on the subject, respecting the lawfulness of the rates from the south—the Birmingham district—is that they are neither unreasonable nor are they discriminatory—at least, they have not [fol. 722] been shown to be discriminatory.

Not a single northern shipper who appeared at the hearing was able to show that he would suffer any undue prejudice if the existing basis of rates was continued in effect, nor were any of them able to state affirmatively that they would be adversely affected by the establishment of rates from the south to the north on the level prevailing in the north.

Commissioner Farrell: There is one trouble there. Is it claimed in this record that if the present rates were allowed to remain in effect instead of those suspended rates, that there would be any undue prejudice between those rates and the rates put in from the south to the north in compliance with the order of Division 4?

Mr. Mohr: There is a little confusion at this time, and it is due, perhaps, to counsel pointing out specific instances. There happens to be cases, I think, from Chattanooga where your present rates from Chattanooga to the north are lower than the northern level, and if you take those particular instances, you can show, perhaps, where discriminatory situations do result. The carriers serving Chattanooga are in the position of being willing to increase those rates to the destination level, and I think that if that were done those situations to which reference has been made will no longer exist.

While this Commission, time and again, has held that southern territory is a higher-rated territory than the [fol. 723] north, this is true only in those instances in which the southern carriers believe that the traffic can and will move under such higher rates. In other instances the rates they maintain are on the same or a lower level than is in effect in the north.

Due to the wholly different character of traffic transported in the south and the wholly dissimilar conditions under which same is transported as compared with the north, it is impossible to state accurately just what are the

relative rate levels in the two territories. One thing is certain—that a very substantial part of the tonnage handled by the southern carriers interested in this proceeding consists of coke that moves from the south to the north on a level corresponding with that maintained in the north. In addition, the passenger rates in the south, which represent an important source of income, are substantially lower than those maintained in the north.

The position taken by northern lines in this proceeding is the same as if they would insist on the maintenance of higher passenger rates from the south to the north than are applicable within the north, notwithstanding the southern passenger rates are lower—and this because of the more adverse transportation conditions.

In the case of coke, the rates maintained by southern carriers, at the present time and for many years in the past, is on a level as low or slightly lower than prevails at present [fol. 724] in the north. It is true that these rates not only are on a uniform basis and that the carriers have in mind revising same, but there is no reason to believe that when revised same will be on no higher basis, or in any event any higher than prevails in the north. Past experience has demonstrated that when a rate level becomes fixed in a territory it is with the greatest difficulty that same can be increased, especially during times such as we are experiencing at present.

It is the contention of the southern carriers that if they are willing to forego the right that they have to a higher rate level than prevails in the north, the northern lines should not be heard to insist that they should be required to charge the very highest rates to which their transportation conditions entitle them. Our reason for this position is twofold: First, we believe that as a matter of law the northern lines individually would be guilty of unlawful discrimination in refusing to participate with southern carriers in establishing competitive rates to destinations reached by them while participating in competitive rates from northern points not served by them. And that is exactly what they are doing in this case.

To illustrate: The Big Four and the Pennsylvania will join the Norfolk & Western in maintaining rates made on scale 2 from Norton, Virginia, or Bristol, Tennessee, to [fol. 725] Fort Wayne, Indiana, Grand Rapids, and Detroit, Michigan, and other northern points not reached by

the Norfolk & Western. But they refused to join the Louisville & Nashville in operating rates on the same basis from the same or adjacent points. The only excuse advanced for refusing to do so is that the transportation conditions in the south as a whole warrant a higher level.

In so far as transportation conditions are concerned, this Commission in the Eastern Class Rate case stated that the transportation conditions on the Bristol and Norton divisions of the Norfolk & Western were such as warranted a higher level than prevailed generally in official territory and prescribed arbitraries to be added to the northern scale. The Norfolk & Western, however, elected to forego such arbitraries and no northern line was heard to object. Why should northern lines object if southern carriers elect to forego higher rates than their transportation conditions might entitle them?

It is respectfully submitted that the shippers located on the line of the Louisville & Nashville, the Southern Railway, and other southern carriers are entitled to the same treatment by Central Freight Association lines as they accord shippers on the Norfolk & Western.

The individual northern lines freely join one another in the establishment of competitive rates, and they wouldn't and couldn't insist upon the maintenance of maximum rea- [fol. 726] sonable rates from southern territory but for the fact that they are combining as a single system to preclude the establishment of competitive rates.

Competitive rates, as the name implies, are those established to meet competition, and in establishing such distance considerations and transportation conditions, they are subordinated to the necessity of establishing a rate that will move the traffic.

The question naturally arises, has not the joint action of carriers in rate groups been recognized as proper by this Commission? The answer is, yes, they unquestionably are entitled to join together for the purpose of accomplishing any purpose that as individual carriers they are by law entitled to. However, they may not, by combining together, be relieved of their individual responsibility of treating all shippers on the lines of connecting carriers alike, and that is precisely what they are doing in this proceeding.

The preservation of competition as between carriers is one of the important factors that has delayed the consolidation of railroad plans. If the policy actuating the northern

lines in the instant case can be enforced in the manner in which they are endeavoring to enforce it, they—in so far as interterritorial rates are concerned—constitute one system; and if their action is condoned or approved by this Commission, it can have but one effect, and that is to make it in- [fol. 727] creasingly difficult for southern carriers and southern shippers to do business in the north except in the case of raw materials and manufactured products that are not produced in the north.

In the instant case the northern lines, we submit, should be dealt with as individual carriers and not as a group, and they should be required by this Commission to join southern carriers in the establishment and maintenance of competitive rates from the south to the north on as low a level as they individually make possible from points on connecting lines in the north.

The northern carriers and northern shippers have had considerable to say about the alleged disadvantageous location of southern coke producers. Southern coke producers are no more disadvantageously located, in point of distance, than are the coke producers in the east who desire to do business in Central Freight Association territory, or the Central Freight Association producers who desire to do business in Western Trunk Line territory. The northern lines have accorded these eastern and Central Freight Association coke producers competitive rates, but they insist that none such should be established from the south to the north. One of the reasons advanced—and perhaps the primary reason—is the alleged advantage that the southern coke producers have in being located adjacent to the coal fields.

In other words, the only reasons that the northern lines [fol. 728] can advance for refusing to participate in competitive rates in the south are, first, the so-called alleged commercial advantage that the southern producers enjoy by reason of their location near the coal-producing sections of the south; and, second, the alleged adverse transportation conditions experienced in the handling of traffic from the south to the north.

With respect to the first reason, this Commission and the courts have often held that it is not the function of this Commission to prescribe or approve rates calculated to equalize commercial disabilities.

With respect to the second, rates are only in rare instances

based on transportation conditions, and certainly this is not done in the case of competitive rates. Furthermore, the adverse transportation conditions that exist are found in the south; and if the southern lines are willing to forego any claim to higher rates because thereof, the northern lines should not be heard to insist that they should not be permitted to do so.

In the determination of what would be lawful rates, as distinguished from maximum reasonable rates from the south to the north, this Commission following its practice in other cases should consider the adjustment prevailing in the destination territory on the particular commodity involved rather than the rate level on unrelated commodities. Recognition of this principle determined the Commission's [fol. 729] decision in the Cape Girardeau Portland Cement case, 95 I. C. C. 632, in which the Commission stated that the interterritorial rates on cement from Missouri to Illinois points should be made in relation to the rates on cement within Illinois rather than on unrelated commodities.

To the same effect was this Commission's decision in the American Sugar Refining Company case, 169 I. C. C. 557, in which it approved as lawful and non-discriminatory the maintenance of lesser level of rates on sugar from Colorado, Utah and other western points to Oklahoma and Texas than in effect from New Orleans.

While it is true that as a general proposition the rates on traffic handled by southern carriers are higher than the rates maintained in the north for like distances on the same commodities, there are many instances in which the rates in the south are on the same or lower level than in the north.

In addition, as I have previously stated, a very substantial part of the tonnage handled by the respondents in the instant case consists of coal destined to northern points which is handled on the same level of rates that obtains in the north. The coal rate adjustment more nearly resembles the coke adjustment than do the class rates. There is no more reason for permitting the class rate adjustment to affect the coke rates than there is for considering the passenger rate level in the several territories as a factor in determining [fol. 730] what should be the proper rates on coke.

The coke rates in the south are on approximately the same or lower level than in the north, and there is no reason why the present rates from the south to the north should be canceled for the purpose of establishing a basis that was

determined upon without any reference whatsoever to the conditions existing in the destination territory.

I just want to point out again and emphasize the inconsistency on the part of the northern lines with respect to their insistence upon making rates based on transportation conditions. This Commission, in the Eastern Class Rate case, had before it the situation of the Norfolk & Western Railway, on their Norton and Bristol branches, and as a result of the representatives of the Norfolk & Western showing the adverse transportation conditions on that line, it prescribed a higher level of class rates from the Norton and Bristol branches of the Norfolk & Western and from official classification territory, than they prescribed within official territory. However, the Norfolk & Western, when it came to publish the rates elected to forego their right to this higher rate level, and in place thereof, they established the northern level. No northern line was heard to complain that that situation would create discrimination because they were compelled to join the Norfolk & Western maintaining less than maximum reasonable rates from points on those branches. The situation is exactly the same here. If the southern car-
[fol. 731] riers see fit, we submit that we have the right to forego our lawful rate to the higher rate level.

Commissioner Farrell: What was done in that case as to the Norton and Bristol branches, you want extended to Birmingham?

Mr. Mohr: No, sir.

Commissioner Farrell: That is not correct?

Mr. Mohr: No, sir—when the carriers desire to do so, yes.

Commissioner Farrell: That is what I mean.

Mr. Mohr: I beg your pardon. I thank you.

Chairman Lee: The Commission will recess until two o'clock.

(Whereupon, at 12:40 o'clock, p.m., December 6, 1934, a recess was taken until 2:00 o'clock, p.m., of the same day.)

[fol. 732] After Recess

Two o'clock, p. m.

Chairman Lee: Mr. Norman.

Argument of Mr. J. V. Norman on Behalf of the Alabama Mining Institute

Mr. Norman: If the Commission please:

I appear in this case for the Alabama Mining Institute, which is an organization representing all coke producers in

the Birmingham or Alabama district. There seems to me to be some confusion about the issues here, and the manner in which they arise. Division 4 of this Commission in Docket 3511 prescribed a scale of maximum rates for application in C. F. A. Territory, and a scale of maximum rates from the Birmingham district only to C. F. A. territory. The Southern carriers reduced those rates from Birmingham district to C. F. A. territory that exceeded that maximum scale. They were not important rates. Most of them were rates that were made on combination and moved little or no traffic. Exhibit 5 of this record shows that rerating the entire 1933 movement from the Birmingham district under the rates resulting from the reductions made pursuant to that decision to come within that maximum would result in a reduction of 3 cents per ton on the total movement, on rates averaging approximately $4.50 per ton. So you can see the unimportance of those so-called reductions.

[fol. 733] But the Northern carriers filed with this Commission a cancellation of their concurrences, not only as to the rates from the Birmingham district but from Chattanooga and southwestern Virginia, the only other places in the South where coke is produced, and those cancellations of concurrences were suspended by this Commission and are here for consideration.

Therefore, the question here is the lawfulness of the attempt by the Northern carriers to compel the Southern carriers to charge the highest that the law permits.

I. & S. 3511 is not determinative of the questions presented here. The only question determined there was as to what would be the very maximum of reasonable rates. Division 4 made no determination as to the relationship of the rates further than to say that the then existing rates had not been shown to be discriminatory.

Commissioner Mahaffie: There are here also under suspension tariffs filed by the carriers to comply with that?

Mr. Norman: Undoubtedly so. When the Northern carriers filed these cancellations of concurrences, with new concurrences limiting their participation on rates made at this maximum level, the Southern carriers filed tariffs to comply with the new concurrences, not knowing whether they would be suspended or not, of course; but the Southern carriers asked for the suspension of the rates and of [fol. 734] the concurrences.

Commissioner Farrell: Have you not overstated what Division 4 did there? They did not find that there was no undue prejudice, but decided that if any undue prejudice existed, the rates they had prescribed would cure it. Was not that it?

Mr. Norman: They found that no undue preference was shown, and on the record they could not find that there was any undue preference, and just added that if there is, application of these scales would remove it.

This whole case arises really from the method used by Division 4 in giving recognition to the so-called transportation conditions south of the Ohio River. Division 4 gave that recognition in the prescription of through rates that carried a penalty for the entire haul of 10 per cent because of the density of traffic, and so forth, south of the Ohio River. That method of recognizing these conditions results in some very unusual situations. For example, under the suspended rates where the movement is through Cairo to a point 50 miles beyond Cairo the penalty for the difference in transportation conditions is 35 cents for the 330 mile haul in the South, but if that traffic moves on through Cairo 400 miles beyond, the penalty becomes 45 cents for the same 330 mile haul within the South.

Not only that, but from Birmingham for total hauls of [fol. 735] 550 miles, the penalty is 45 cents, whether through Cairo or Cincinnati; but if the movement is through Cairo, the haul within the territory from which the penalty is assessed is 150 miles less than if it is through Cincinnati. That is contrary, of course, to all recognized principles of rate making.

If there is assessed an arbitrary for conditions existing over part of the haul, that arbitrary is supposed to diminish as the length of haul increases and ultimately to disappear. Under this method of assessing it, that arbitrary increases as the length of haul increases, although that for which it is assessed remains the same.

Had Division 4 prescribed arbitraries to be added for the haul within the South as maximum, just as everything else that was prescribed was prescribed as maximum, the Southern carriers would have been free in the exercise of their managerial judgment to charge or forego those arbitraries, and would not have been compelled to ask the consent of the Northern carriers. That method has been used by this Commission in many cases. The short line railroads in

the Class Cases were authorized but not required to add arbitraries for the hauls over their short line roads because of the difference in transportation conditions. In practically all of the Northwestern Cases arbitraries have been authorized rather than increasing the entire through rate, [fol. 736] no matter how far it went. So that if Division 4 had used that method of recognizing the so-called difference in transportation conditions south of the Ohio River, the northern carriers would have had nothing to say about it, and they ought not to have anything to say about it, because it is a penalty that is assessed not for their benefit and not for service performed by them, and they perform the same service whether it originates south of the Ohio River or at the Ohio River. I contend that when they insist that the Southern shippers must pay more mile for mile than the northern shippers, that insofar as they are concerned they are guilty of undue discrimination because there is no difference in the service which they render as between the two.

So we have here, as I see it, the question of whether or not the Northern carriers may lawfully compel the Southern carriers to assess a charge that is added to the through rate because of service rendered by the Southern carriers and not by the Northern carriers. Certainly not, it seems to me, so long as rates are on the same level, distance considered, mile for mile. The Northern carriers would have the right to object, perhaps, if the Southern carriers were undertaking to charge rates on a lower level than that obtaining within their territory, which would mean a lower level than that which the Northern carriers charged to Northern shippers. But I do not see on what ground the Northern carriers can object so long as the rate is on [fol. 737] a level with the Northern rates. It is not a question for them to exercise their managerial judgment on. The Southern carriers are here saying, "We demand the right to exercise our managerial judgment as to whether or not competitive conditions will permit us to charge the maximum reasonable rate under the law, and our judgment is that it will not."

Commissioner Farrell: Does not what you have just said necessarily apply only to hauls within the Southern territory?

Mr. Norman: Yes, but that is the only part of the haul, though, for which any addition is added.

Commissioner Farrell: In other words, your managerial judgment does not apply to hauls in C. F. A. territory?

Mr. Norman: No, no, not at all, but the Northern carriers are saying to the Southern carriers, "Because these rates are so published as to make us necessary parties to it, we require that you shall charge the maximum that the law allows, even though in your judgment that is going to adversely affect your traffic and your revenues." They cannot claim by any show of reason at all any addition to their revenues because of the fact, perhaps, that the service rendered by the other carriers is more difficult than it would be if it were rendered in C. F. A. territory. So it seems to me that if you look at this situation in a practical way—un- [fol. 738] less you take the legalistic contention for those rates that they have been published by the carriers, and unless they have been shown to be unlawful they must be allowed to become effective—if you look back of a mere publication of the tariff and see that these rates have not been published by the voluntary act of all the carriers concerned, you come then to the question as a practical matter as to whether the Southern carriers have a right in the interest of their own traffic and their own revenues to waive an addition to the rate which is authorized solely because of a service rendered by the Southern carriers.

Commissioner Farrell: What I do not understand about it so far is, why were the Southern carriers compelled to join in those rates that the Northern carriers wanted to put in?

Mr. Norman: Mr. Commissioner, the only reason is because the Northern carriers had cancelled their concurrences in the other rates, and had limited their concurrence only to such rates as these.

Commissioner Farrell: Yes, but could not the Southern carriers without any order from the Commission to the contrary have put in rates to the Ohio River to be added to rates from there on in Official territory?

Mr. Norman: I really do not know, so far as that is concerned, what alternative the Southern carriers had. They take the position here that they had no alternative, and [fol. 739] they did this under the compulsion of the cancellation of——

Commission Farrell: I am not bothering you unnecessarily, I am bothering you because I want to understand myself. What I would like to have you tell the Commission,

if you can, is what the Commission can do in the premises. It is one thing to say to carriers that you must do something. It is another thing to say that they can in the first instance use their own judgment, and then the Commission does not interfere with that unless in using their own judgment they violate some provision of the Interstate Commerce Act.

Mr. Norman: In this case, one thing the Commission could do would be to change its method of authorizing this addition to the rate from the South up to the Ohio River, and authorize that it be published as an arbitrary which Southern carriers could forego if they saw fit. In this very case that was done as to the rates south and west of Zone 1 in the Northwest. There are arbitraries provided there. Those carriers out there do not have to add them unless they want to. But those carriers do want to add them because there is no coke produced out there and it is just a question of how much rate they can get, that is all.

Commissioner Farrell: I understand what you are saying now is exactly what was done in the Class Rate Case. They made the K-2 scale to apply in the North and added to it for transportation to the North what is called the Q-1 [fol. 740] scale.

Mr. Norman: I say that can be done here, but also here the Commission can say that any rates from the South to the North made on a higher level mile for mile than obtains within the North result in undue discrimination.

The Northern shippers offered no evidence at all on this question of undue discrimination. As this Commission knows, the question of discrimination as a question of fact, and it is not established by mere comparison of rates, nor by a mere disparity in rates. No Northern shipper took the stand as a commercial witness to say what the commercial situation was. There were only three witnesses for the Northern interests, and they were traffic managers, who testified about rates and not about the commercial situation. Therefore, there is no evidence that rates made on the same basis mile for mile would unduly discriminate against northern shippers.

On the contrary, two commercial witnesses took the stand from the south, testified about the competitive situation, testified as to the handicap they had to overcome when rates were made on a mile for mile basis by reason of their longer

hauls, testified that under existing rates, they were excluded from a large part of this great consuming territory, and testified that the application of the suspended rates would shut them out of practically the entire territory. That [fol. 741] evidence was not contradicted.

So I say that not only the weight of the evidence but all of the evidence in this case establishes that there will be a discrimination against Southern shippers if they are compelled not only to overcome their handicap of greater distance but have added to that handicap an additional handicap of charging them a higher rate mile for mile.

As to the question of justification for any penalty, Division 4 authorized the addition of 10 per cent to the through maximum rates on the ground that the South was a territory of less density of traffic and a higher rated territory. I do not think that it is necessary for this Commission to determine that question here, but I do want to say that I want to submit to this Commission that density of traffic does not necessarily reflect transportation costs, nor is it true necessarily that because there is less density of traffic there is a higher transportation cost.

There was filed in this case a study prepared by the statistical Bureau of this Commission issued in Statement 3120, and that study finds that the carload costs for 300 miles are $69.63 within eastern districts, and $69.04, or slightly less, within the Southern region. On a gross ton mile basis and on a loaded car mile basis, $74.70 in the eastern district, and $73.63 in the Southern district.

So that I say that before this Commission assumes the [fol. 742] heavy responsibility of adding to the handicaps of the already handicapped long haul shippers from the South and the West, on the ground that the transportation cost is greater in the South and the West, it ought to have something more to base it on than a mere assumption that because there is less density of traffic there is a higher transportation cost. Particularly is that true in the light of the result of this study by the Bureau of Statistics.

Another thing in this case, even if we assume that there is some difference in transportation conditions by reason of the less density of traffic, this scale is so constructed as to favor the short haul shipper as against the long haul shipper, certainly to a sufficient extent to take up the slack of any such difference in transportation conditions as might

result from the difference in traffic density. I have not time to go into that, but the witness for the Louisville & Nashville Railroad compared the scale with some 42 other scales, either prescribed by the Commission or voluntarily maintained by the carriers, and he showed conclusively that this scale was relatively higher for the long haul than these other scales. But that again is a matter that it is not necessary, it seems to me, to go into here.

It seems to me that the Northern carriers here are in an impossible condition. They come here and say to this Commission, "We are going to and have by our new concur- [fol. 743] rences frozen the rates that may be charged from the South to the North. At the same time we reserve to ourselves the right to exercise our managerial judgment in reducing rates within the North below the maximum scale. We exercised that judgment to a very considerable extent when we published those rates because many of those short haul rates are below that maximum scale."

Not only that, but two of these carriers, the Chesapeake & Ohio and the Norfolk & Western, after this scale was published, exercised their managerial judgment to reduce the rates from their ovens in Ohio to the Virginia Cities, Richmond, and Lynchburg, 55 and as much as 70 cents a ton. And at the very time they were doing that they were freezing the rates that might be charged by the Southern carriers.

It has been said that I referred to the Northern carriers as demanding the pound of flesh. What I said was this, that inasmuch as the Northern carriers are not entitled to any addition to their rates, and inasmuch as the service for which this addition is authorized is not rendered by them, when they demand that that addition be made to the rates they are demanding that the pound of flesh be severed even though it is not to be delivered to them, and it has been so settled. Of course, Your Honors, the Northern carriers are not guilty of any such unjustified prerogatives as that illustration might suggest, because they have a reason, a [fol. 744] reason that goes beyond the desire to have the pound of flesh severed, and that reason is that they want to shut the Southern carriers' traffic out of their territory. They could have no other reason. What difference does it make to them, forsooth, so far as revenues are concerned, whether those Southern carriers make this addition for their haul or not? It does not belong to them; under any kind

of reasoning it does not belong to them. Their purpose is to keep the Southern carriers' traffic out of their territory so as to protect the shippers on their own rails. And this Commission has repeatedly held that carriers are not justified in taking any such position.

I want now to refer briefly to some of the previous decisions of this Commission:

This Commission has repeatedly held that rates made on the same basis, distance considered, or mile for mile, from the South or the West into Central territory do not result in undue discrimination.

In the Krupp Foundry Company against the Southern Railway Case, it held that as to cast iron pipe and fittings. In Terre Haute Paper Company, et al., versus Ann Arbor Railroad Company, 192 I. C. C. 281, it was so held as to paper board and kindred articles. In American Distilling Company vs. A. C. & Y., 140 I. C. C. 635, it was so held as to denatured alcohol. In the Newsprint Paper Investiga-
[fol. 745] tion, 197 I. C. C. 738, it was so held as to newsprint. In the Consolidated Stone Cases, 200 I. C. C. 65, it was so held as to rough stone.

I think I might read what the Commission said in this Terre Haute Paper Case setting forth the position of the Southern carriers; after setting forth a table of representative rates the Commission stated:

"It will be observed that in some instances the rates from Southern producing points to the Ohio River crossings and points north thereof are more, mile for mile, than the rates within Official territory."

It appeared, however, that while there were some lower and some higher, they were on the whole probably slightly higher.

Then the Commission, referring to the Southern carriers' position, said:

"The Southern carriers contend that as the rates on paper board from Southern producing points to the destinations considered are generally somewhat higher, mile for mile, than the rates within Official territory, they are now unduly low and do not result in undue preference of the Southern producers, or in undue prejudice to complainants. They state that it has long been their policy to encourage industrial development in the South by establishing rates

on manufactured articles therefrom to important markets in Official territory on the same basis, mile for mile, as the rates applicable within the latter territory, and that the [fol. 746] propriety of such a policy was upheld in Hosiery from Southern Points, 156 I. C. C. 117. These defendants point out that in American Distilling Company versus A. C. & Y. Railway Company, 140 I. C. C. 633, Division 4 condemned as 'unsound from a practical standpoint' a proposal that commodity rates on denatured alcohol from Southern points to destinations in Official territory should bear the same relation to the corresponding first class rates as the commodity rates contemporaneously in effect within the Official territory bear to the class rates; and that in Krupp Foundry Company versus Southern Railway Company, 148 I. C. C. 743, we found that rates on cast iron pipe and fittings from points in Southern territory to destinations in Official territory would not be unduly preferential of Southern producers if they were not lower, mile for mile, than the rates from points in Official territory to the same destinations."

The Commission there dismissed the complaint.

So we find that in quite a line of cases the Commission has held that rates made on the same basis, distance considered, mile for mile, do not result in preference to the Southern producer or Western producer, as the case may be. But there have been a few cases to which reference has been made here today in which the Commission has authorized or prescribed rates higher, distance considered, from [fol. 747] the South or the West into C. F. A. territory than prevails within that territory. I have made an earnest effort to arrive at a reconciliation of these cases, and it seems to me that they may be reconciled on this ground, that there has been a difference in the method of distribution of the transportation burden in the different territories. In these different cases the Commission has tried to take the situation as it finds it and not pull it up by the roots, as it would do if it suddenly made higher or lower rates from one territory than prevailed therein before.

The Stove and Range Case and the Vehicles from Georgia and Tennessee Case were cases involving commodities either moving on class rates or related to class rates. Of

course, as the Commission knows, the class rate level in the South is much higher than it is in C. F. A. territory. The difference in the class rates does not reflect, however, a difference in the rate levels, because in the South the transportation burden has been differently distributed, and on many commodities, as this Commission has pointed out—and that is true of the commodity here under consideration, coke—the general level of rates in the South is lower than it is in the North. So it seems to me that the Commission has undertaken to take those situations as they found them.

But we have here a case where the general level of rates [fol. 748] on coke is lower in the South than in the North. It is true the Southern carriers have said they expect to revide those rates, but that general level has been in effect many, many years. It has not been revised. Certainly, if we are to take things as we find them, it is conclusively established here that the level of coke rates is lower within the South than within the North.

Should Your Honors find justified the suspended tariffs and the suspended cancellation of concurrences and let these rates become effective, we would have a situation as to these coke rates which I believe would be unique in the entire rate structure of the United States. We would have a case where the level up to the Ohio River rises a little when it comes to the Ohio River and runs in C. F. A. territory. Then when you go to consider the interterritorial or overhead rate, it is 10 per cent higher than the highest of the two levels which it is supposed to reflect. As I say, that would not only be a unique situation, but it seems to me it would be an indefensible situation. And yet that is the result of these tariffs.

Now I want to refer just briefly to the historic situation that we have here. For many years it was the policy of the Southern carriers on low grade commodities such as that involved here to maintain rates from the South into the North, where the market was on a lower level than obtained [fol. 749] within the North. This was necessary because of the longer hauls. At that time there were numerous north and south lines running from the Ohio River north that were independent of the east and west lines, and it was those north and south lines that joined in these lower rates on heavy low grade commodities from the South in order to permit them to move.

Gradually these great east and west lines, the Pennsylvania, the New York Central, the Baltimore & Ohio, and the Van Sweringen interests, have bought up those north and south lines, and as they have bought them up, have refused to join in these lower rates. It was only within recent years, however, that they had the temerity to demand that these rates be made actually on a higher level, distance considered and mile for mile, than obtained within C. F. A. territory.

We have here today that situation complained of. These great east and west lines who want all the traffic to go to the east and west movement and shut up the movement from the South have cancelled these concurrences. Many of the other independent lines have refused to do so. Reference was made here to such a line as the Wheeling & Lake Erie, but we cannot reach the Wheeling & Lake Erie unless we use one of these great east and west lines, or one of their tributaries that they have bought up and are running from the Ohio River north. When we get over the Ohio River into the Indiana and Illinois territory they do not [fol. 750] control them all and they could not get such roads as the Illinois Central to join in this demand of theirs that the Southern traffic be shut out by being charged a higher level than obtains within C. F. A. territory. The result is that we have today going rates to points like Chicago. True, these great east and west lines do not join them, which means that they just have given up that traffic. So far as those points are concerned we do not care whether they join them or not.

Commissioner Farrell: Now you have told us what would happen if the Commission found these suspended rates justified. Would you mind expressing an opinion as to what would happen if the Commission found they were not justified?

Mr. Norman: Yes, sir. The first thing that would happen if the Commission found they were not justified is that the present rates would stand in effect.

Commissioner Farrell: And that would bring about the discrimination complained of?

Mr. Norman: No, sir: The present rates so far as the Birmingham district are concerned are higher than the scale 2 rates which now obtain in C. F. A. territory.

Commissioner Farrell: My trouble is that the Southern carriers acquiesced in the decision of Division 4, as I under-

stand it, as to a lot of these rates from the South to Official territory and put them on this column basis, but these rates that are in this case are lower than that Column 3 [fol. 751] basis and would remain so, so therefore there would be a discrimination between these rates and those that have been on the Column 3 basis.

Mr. Norman: In the first place, Mr. Commissioner, they acquiesced to some rates in the Scale 3 because they had no alternative. The rates they had in effect were higher than that and these were maximum rates, and they had to reduce them.

Now, coming to your proposition, if the Commission finds these rates not justified, in the first place, this Commission has repeatedly when finding rates not justified provided what would be the proper rates to establish.

Commissioner Farrell: That is, expressed an opinion regardless of whether they can compel the carriers to put them in or not.

Mr. Norman: I think they can compel them to put them in because when the Commission enters into an investigation as to rates, they may enter any order that they could have entered with respect to those rates in a proper proceeding instituted after it became effective. That means you could institute an order saying what the level should be.

Commissioner Farrell: Can we compel the Northern carriers to join in the lower rates from the South?

Mr. Norman: Why not, if Your Honor please, so long as they are not lower than their own rates?

[fol. 752] Commissioner Farrell: The point is that we are handicapped by the fact that we made maximum reasonable rates. Now, can we compel them to put in rates lower than maximum reasonable rates? In other words, could we in this case compel the Northern carriers to join in rates lower than the maximum reasonable rates that Division 4 made and with which the carriers complied?

Mr. Norman: I think so, Your Honor; because of the fact that the addition to that rate was not made for their benefit or because of any services rendered by them, the Southern carriers are demanding that they be required to join in the rates on the same level as obtains within C. F. A. territory. But if the Commission should conclude that it could not proceed that way, then it certainly can proceed by providing that this addition to the rate may be published

as an arbitrary up to the Ohio River, to be charged or not, as the Southern carriers may elect.

I believe my time is about up. I just want to say this in conclusion:

This question has been up here many times in many different forms about interterritorial rates. Of course, the difficulty arises from the fact that the rates not only have been on a somewhat different level in the different territories, but that, as I said before, the transportation burden has been differently distributed in the different territories. In [fol. 753] one territory the class rates will be relatively much higher than in another. And at the same time the commodity rates that carry the heavy low grade commodities will be relatively lower than in the other. So that when you go to construct these interterritorial rates, and of course in the old days, as Your Honors all know, these rates were constructed on combinations on the territorial boundaries, generally speaking—when you go to construct these joint through rates, you are confronted with not only the differences in these general rate levels but the differences in the methods of making the rates.

Commissioner Farrell: That is, the distribution of traffic within particular territories?

Mr. Norman: Yes.

It seems to me that the controlling factor from a practical standpoint is, how are you going to construct these rates so as to let the traffic move. The Congress has enjoined upon you to so construct rates as to permit the possible movement of traffic. How are you going to do that? You can only do that when you recognize the competitive situation.

It has been said, I think more or less loosely, that under the law this Commission may not recognize the competitive situation, but no consideration of transportation conditions [fol. 754] can be had from a practical standpoint unless you recognize the practical factors in the situation, and the principal factor is the competitive situation and the ability of the traffic to move.

I say to your Honors that there is no such difference in transportation conditions or costs between any of the territorial divisions of this country as to require that an interterritorial rate shall be made on a higher basis from one

territory than obtains within the destination territory. There is no such difference.

Commissioner Tate: Grant, for the sake of a question, that the Commission might be with you on the merits. Can it in writing an order in this I. & S. Case do more than say that these rates are not found justified without prejudice to some other kind of rate? Can it in this I. & S. case compel that joining on the part of Official or Central Freight Association carriers?

Mr. Norman: I think so. I do not see why not. You can say that those rates would be non-discriminatory and that the Southern carriers may waive, if they wish to, the additional charge for their additional service, and that the Northern carriers may be required to join in rates on the same level as obtains within C. F. A. territory.

Commissioner Tate: In asking that question I do not mean to raise the question of substantive law as to whether or [fol. 755] not they could not be compelled to do it in a case where that was the single charge, but can we in this I. & S. case?

Mr. Norman: I do not see why not. But as I said before, if Your Honors indulge any doubt on that point, if you feel as I believe you must that justice requires that you permit these Southern carriers to maintain these rates on that destination level, you can do so by prescribing the arbitraries up to the Ohio River to be added to the same through rate as applies within C. F. A. territory.

The point I had just reached when I was interrupted a moment ago was that I do not believe there is any such difference in transportation conditions throughout this country as to require a difference in the interterritorial rate and the rate within a territory, going in that territory. If that be true, if the zone of reasonableness, the maximum limit and the minimum limit, will permit that, then I say to your Honors that when you undertake to draw lines across this country and say that "If you live on one side of this line you have to pay a higher rate to this common market than if you live on the other side of this line", you are dividing this country and setting up in effect tariff laws for one section as against another. I submit the law does not contemplate any such action on the part of this Commission. Thank you.

[fol. 756] Argument of C. E. Widell.

On Behalf of the Tennessee Products Corp.

Mr. Widell: May it please the Commission, the questions that have been asked from the Bench are simply the same questions that have occupied our own minds, because we realize that if the Commission has no power to require a thing done for shippers, then shippers have no right to that particular thing.

So that when the question arises as to whether I, as a shipper of coke from Chattanooga, Tennessee, to Central Freight Association Territory, whether I have a right to a level of rates no higher from Tennessee to the North and within the North on coke, I must consider then not only what I would like or what I need in order to stay in the business, but I must consider also, does the law give me that right and does the law charge this Commission with the duty to see to it that I get it?

So that when you ask perhaps either orally or in the written page legal questions as to the principles of law, it is not with the basic idea of it or from an academic standpoint, but based on my own experience as a practical traffic man, how is the thing possible, has it really some foundation in a case like this, before I am prepared to convince others of our needs and also what we are entitled to.

I always find that it simmers down to what am I entitled, [fol. 757] rather than what I would like or what I need.

The carriers do not have to give me more than I am entitoed to, and if they give me more it is a concession, not to me, but a concession on their part, either an effort on their part to increase their traffic or get some revenue, and that is their business.

Now, if it helps me, then it helps them. Now, has the Commission authority or power to compel northern lines, the northern respondents, here today?

Commissioner Tate: In this case.

Mr. Widell: In this case. The question of the Commission's power to require them to join the southern carriers in establishing Scale 2 rates, that is the Central Freight Association level, from Chattanooga to Central Freight Association Territory, and I speak, of course, for Chattanooga myself, although for southern interests as such, but I represent Chattanooga.

I would say this, that the Commissioner has ample power, it must have so, otherwise the rights that are due, not only to me, but to the southern carriers, would be impaired and denied them.

Now, all carriers, for that matter, including the southern carriers, have rights that transcend even the power of this Commission, because the Commission's power, as well as my rights under the Act, are derived, as it were, from [fol. 758] that Act, but the carriers are not limited by that Act alone, they go behind the Act before it was ever formulated.

In other words, all carriers enjoy, as it were, what the Supreme Court has called a "living power". It isn't only a question of the exercise of the right.

Now, like in that Minnesota mortgage case before the Supreme Court, the question was the power of the state to declare the moratorium. It was argued that the emergency there was so acute that the act was proper. The Supreme Court said, of course, first, that emergency does not create power. I might feel that there was commercial necessity, but all of that does not create the right; the right must be there before it is ever exercised and the right is there long before the act was ever required.

The carriers had this right. Now, it isn't only a question of one carrier against another or one group against another.

May I illustrate it in a somewhat homely way perhaps? First, though, let me apply another's reasoning for that in law and in equity, a distinguished member of this Commission—I speak of Mr. Chairman Lee—suggested in a very recent case involving wheelbarrows and trucks from Chattanooga and Rome, Georgia, to Official Territory generally, and Trunk Line and New England Territories, including the Seaboard cities and the interior points.

[fol. 759] The southern carriers published from Chattanooga and Rome to—and the border territory, and to the Seaboard cities, Baltimore, New York, Washington, and so on, Boston, the northern level, mile for mile, figured on the short line distance all-rail and applied that to rail and water traffic. The Official Territory lines said that they would meet those rates to the seaboard points, but would not join on traffic going into the interior where they alone reached the market.

Unfortunately for us, that case, as a matter of rate making, and the principles underlying rate making, I think the majority decision of the Division handling that case, I do not recall the Division, but I think Mr. Chairman Lee in his concurring in part opinion said at Page 406, reported in Volume 203 I. C. C., Page 397, but on Page 406, among other things:

"I concur with the contention——" and I beg the most earnest consideration of this, because I would say it answers your questions, Mr. Commissioner, does a mere potential failure of the southern shippers in their efforts to reach the North, it answers the question whether you have the power in this proceeding to compel northern lines to exact no higher rates from me than what they have a right to exact for their services.

"I agree with the contention of the southern carriers [fol. 760] that the northern carriers should not be permitted to charge on this traffic from the South to interior destinations in Official Territory, rates on a higher level than are maintained—" that is, by themselves— "on the same commodities between points within that territory."

May I, before I go on to that little illustration I spoke of with reference to the rights of northern carriers, because that is what I would consider Mr. Chairman Lee as having in mind in his concurring in part opinion, that is, that the northern lines of themselves and as a matter of right, for themselves have no right to demand this higher level so far as the rights of the northern carriers are concerned, we hold that in any controversy between northern and southern carriers, regarding the rate level that should apply on any given commodity from the South to the North, that the northern lines cannot by right demand a higher level than observed by them in the North. Their rights limit them to the northern rate level. If they demand more they exceed their lawful right and they do more than that, impair the rights of southern carriers and shippers.

It may be that southern carriers might choose to exercise their right to a higher maximum rate level, if that is justified by transportation conditions in the South, that is, are they the same or less favorable as to operating conditions, and so on, but it does not lie within the power of the

[fol. 761] northern lines to compel the southern lines to exercise such choice of higher rates.

Now, may I illustrate that: Here I am a shipper of coke from the South. I complain to my Chattanooga carriers. I say "I just can't reach the North on this scale."

They say, "We don't want to stick you with it," as it were.

I say, "Well, who is responsible for it?"

They say, "The northern lines."

I say, "Is that so?"

They say, "Go see the northern lines and if they will withdraw their objection, why we will publish the level of rates."

I say, "Well, why should I have to go to the northern lines for that?"

And they say, "We grant you that."

I say, "Well, I will go to the northern lines," and I go North and I speak to the northern carriers and say, "Why won't you join with the southern carriers? What is it about my traffic that you get at Cincinnati, as it were, going to Detroit, that costs you so much more to handle than the traffic you hand from Ashland, Kentucky, to Detroit, right through Cincinnati, and on up to Detroit?"

I might say to the Baltimore & Ohio Railroad, which doesn't serve Ashland, which doesn't serve Chattanooga, [fol. 762] but it serves, say, Detroit, and it takes Ashland traffic at Cincinnati, and it takes my traffic at Cincinnati, and that brings up the question of discrimination under Section 2, the matter of carriers, but I say to the Baltimore & Ohio, I say, "What right have you got to demand and exact a higher rate from me than you do on the shipment from Ashland?"

And so I am punished, penalized with a higher rate level.

The southern lines tell me that they are not responsible for it. Well, but the northern lines say that is the very reason you are going to get this higher level, because of conditions in the South. Well, I say, that is a different story, if that is the case.

I come back South, and the southern carriers say, "Well, they are just fooling you", as it were, "There are no conditions in the south that require this higher level. Our rates are lower within the South and to the Ohio River than to the North and also what we want to give you going to the North, lower than what we want to give you."

I say, "Well, they tell me that the rates are higher because of transportation conditions, that transportation conditions are less favorable in the South."

Well, the southern lines tell me different, they say that isn't true, that it is the other way around. And the northern lines say that when you analyze the rate that you pay, it is because of the different transportation conditions. [fol. 763]

"Oh", I say, "I see."

I get a lesson, as it were, in the mechanics of rate making, the transportation burden is distributed differently in the two territories. I have learned something, as it were, that rates in the South can lawfully be lower than in the North, and then I go back to the northern carriers and I say to them, "Listen here, I am going to ask the Commission for an order under Sections 1, 2 and 3, against you unless you cease and desist from demanding and exacting and penalizing me with higher rates than you are entitled to here."

May I say this, that when the rates were published from Chattanooga, to begin with, in 1916, and by the way the northern lines would have the record show that they have seen and known the fallacy of the rates from Chattanooga to the North at least 20 years, but the witness who said it didn't even know how long the rates had been in effect, they have only been in effect since 1916 to date, and I have had personal dealings with these rates since practically the first of 1926, and until Docket 3511 and allied cases came along, there wasn't any complaint about my rates, mine have been entirely satisfactory.

[fol. 764] What they did was to put Chattanooga on a basis with the bee hive ovens in Virginia that were shipping into Central Freight Association Territory, particularly to Chicago, on a basis that was much lower than Connellsville, and then Virginia was brought up to the Connellsville basis and we followed, and from that time on we have followed the Connellsville basis all the way through, whereas Virginia had been lower since the 40 per cent increase in the North, and we went up on that basis in spite of that.

In 1920, our rates joined up until about 1923, but anyway we have followed the Connellsville basis. There was just as much competition with their by-product coke ovens, all these fields, but there was no proof of undue prejudice in

Docket 3511, and that is why Chattanooga was left out, I reckon.

Now, I grant you this, your Honors, and I think I have so clearly stated in my brief, and perhaps will have to fall back upon that for a clearer statement of the views, at least of the Chattanooga interests, and which, too, by the way, I relied upon the most able remarks and reasonings of Mr. Commissioner Meyer.

In these things there is wonderful encouragement to us in the study of the case, and permit me to say and permit me again to rebut and refute the charge made against the southern shippers in that case. We have not and we do not [fol. 765] ask for rates from the South to the North low enough to do a satisfactory amount of business in the North.

We ask merely for the observance of certain rights. Now, as I said before, the southern carriers can carry me a whole lot further than they themselves may. In other words, they have a level of rates that cannot be denied them. The northern lines must themselves demand a higher level than they themselves observe in the North, which are limited by transportation conditions in the North.

Now, if they show me how to net more business, then they can have more money, if they demand it. So that the history of rates from Chattanooga to the North is merely one of common concurrence and consent of these lines that are here today; they have revoked their concurrence, but regardless of the history of the rates, there has been this revocation of concurrence.

Let me say as to the commercial conditions, the record is complete in this case, where it was lacking in Docket 3511, so far as the South is concerned. We cannot enter all markets in the North; prices will not permit; there are only a few important markets that we have been able to enter on the existing market prices. That is, prices which reflect the rate established in Docket 3511.

The NRA bituminous coal code has gone right far toward increasing prices, so the controlling factors at Bir- [fol. 766] mingham, *Birmingham* can't get any more for its coke in the North any more than Chattanooga can. We need controlling pri- that are set by the producers in the northern markets so that we cannot enter Detroit, because the return to us on our low rates of $3.65 is only $2.60, and we cannot sell for less than $3.50; $3.50 is our irreduceable

minimum, so we are shut out of practically every market today in the North on our present rates.

Scale 2 will increase the rates from Chattanooga to practically every point where I do business in the North, except Chicago, and it will maintain that within 1 cent to Chicago, and Chicago has not been a big market for us because largely domestic coke moves from Chattanooga.

Reference is made in the record and on brief of opposing counsel for northern carriers as to the sale of Chattanooga coke in Detroit last winter. It is testified by commercial witnesses for Chattanooga that the only time the Chattanooga and Birmingham coke got into northern markets, Detroit or any market for that matter, is in the winter time, in the time of emergency, cold weather, when the stocks in the North are depleted.

The intimation is made by counsel that it was because they could get it from us cheaper than from anybody else. The record will speak for itself. The record was merely that one of the producers in Detroit ran short of coke in [fol. 767] such an emergency and that emergency was cold weather, and it had to pay us exactly the same price as it would have had to pay anybody else, but we had certain sales arrangements with them and they took our coke, the particular people who purchased our coke in Detroit had purchased one of the large controlling interests in the South, and yet they took our coke, showing that in times of emergency that time we can get in, but if I would get an increase, a scale would increase me from 90 cents, from $3.65 to $4.55, we could not have moved a ton last summer, even in those distressed conditions.

But Scale 2 will make it $4.15. I do not ask the Commission to maintain me personally from Chattanooga to the North, for the reason that a rule must work both ways, not only are the carriers required to observe Sections 2 and 3 with respect, to me, but they must observe Sections 2 and 3 with respect to the northern producers as well, and in order that Baltimore & Ohio hauls from Cincinnati to Detroit, coke from Ashland, on a higher rate level than the hauls for me from Chattanooga through Cincinnati, itself, where the expenses are exactly the same, in the same train, the same train crews, and with respect to everything, then I believe it is guilty of unreasonable and unlawful discrimination and undue prejudice against Ashland.

Now, there are certain well defined rules in the law that, [fol. 768] of course, give us what is a starting point, as it were. In other words, absolute equality. When I ship over the northern carriers' rails, I can demand that they treat me no differently than they treat my competitors and if no conditions exist in the southern territory that require a higher level for me, then I will lawfully demand the northern lines give me the same rate they give my competitor, that is, for the service they perform.

So, it all comes down to a question, I think, in the words of Mr. Chairman Lee, that if that were made a simple rule that northern carriers have no right of their own to exact this higher level—I do not mean now that I would not be required to pay it, I may be even required to pay Scale 3, but not on the record in this case. There is a lot of evidence in this case that says that the rate level in the South should be higher than in the North, or that the distribution of the transportation burden today on coke is wrong, or that coke rates are plumb out of line in the South, that the southern carriers are losing money on them.

If this Commission is to reiterate and affirm the order in Docket 3511, it must do so on a minimum rate order.

With respect to Scale 3 from Chattanooga to the North, in other words, that is to be converted into a minimum scale, which is the desire of opposing counsel for the north- [fol. 769] ern carriers and the northern shippers if it is to be converted into a minimum scale, then it must be accompanied by a minimum rate order under Section 15 (1) and it must be founded on Section 15(a) and also on Section 3, with the present rate, or that Scale 2 is unreasonably low, and it must be, of course, supported by an adequate record, and all of that is lacking in this particular case.

I would like to call your attention to one thing; I participated in Docket 3511*1* from the very beginning, participated in the conferences that antedated Docket 3511. I participated also in Docket 3985. One of the important things that was there stressed, by the way, in all of our conferences antedating Docket 3511, and I was participant in that proceeding, and it is referred to in the Commission's report to some extent, was the plea on the part of the producers in Central Freight Association Territory, Indianapolis, Terre Haute, Chicago, Ashland, and so on, that not only must you, the Commission, in that case fix a reasonable level of rates so far as the level is concerned, but

it should be very careful, and pleaded with you to see that each producer up there was not required to carry a heavier rate burden than the equity of the situation demanded, as it were, their location, and so on.

In other words, they each wanted the maintenance of their own competitive relationship, one with another. Then, they [fol. 770] went further and said, "Now, we must be sure that the level of this section and this scale don't go too high, the long haul shipper didn't want his long haul rates too high, for instance, Ashland, Kentucky.

Chicago did not care because it was mostly a short haul, and they wanted the long haul rates high, but the plea of every one of them was that we can't stand a heavier rate burden on our traffic.

Well, of course, the southern shippers come along and, of course, our movement into the North is inconsequential relatively, compared with the relatively heavy movement up there, and it is only, as it were, a relieving of surplus production in the South, which is true in all coke production and all other factors with which coke has no relation, and yet coke is one of the results. Now, this normal surplus production must find an outlet in the markets of the country.

We produce about three quarters of a million tons of the stuff in the normal production, but there are only markets for no more than say a little over half of it, and we have got to go outside with it; it is for the public welfare of that great section of the country. It takes men to haul it, requires a vast amount of traffic from the North to the South, to support that population, at least in some semblance of decency. How the North would suffer if the South shut [fol. 771] them off in their traffic, as it were, that it is now required to move from the North.

The South is only a producer of raw materials and some finished goods. Furthermore, may I ask why should I pay a higher scale going North than my northern competitor? The only answer can be, if there are transportation conditions in the South that req-ire it. You will pay it if the carriers demand it, if you want to ship, and when the carriers come to me and say, for in the first place there are no conditions that require a higher level and, Widell, then we would not exercise our right to those higher rates.

If the Commission should then come along and say to the southern carriers, "We will compel you to exercise

that right," on what ground would you do it? Section 1, 15(a) and Paragraph 1 of No. 15, the minimum rate order? But it would have to be upon an adequate record to support orders of that kind.

Is it any different when northern lines come along and say to southern carriers that we will sit in the place of this honorable body, the Interstate Commerce Commission, and compel you to pay a higher level of rates? On what grounds?

No rights that mind you reside in them; the rights belong to the southern carriers, and is it not a simple rule of law that no right may be exercised so as to impair the right of [fol. 772] another, especially where that right is of equal dignity.

It does not have to be written in the Interstate Commerce Act; this is a rule of law, and the carriers are still operating under the law that antedated the Interstate Commerce Act, and especially with respect to their right. Their rights have been concerned within certain limits now and this Commission has unlimited power to confine them within the limits of the Interstate Commerce Act. But no further.

Going back to that rate burden that was referred to. Competitors of ours, they don't want that heavy rate burden. Ask them to pay Scale 3, and they cry, as it were, to the clouds, "Oh," they say, "Go to the southern shipper; make him pay."

Why? "Oh, cheap labor."

I ask that that be stricken from the brief of opposing counsel for northern carriers.

Commissioner Lee: You have five minutes yet.

Mr. Widell: Reference in the brief for northern respondents to cheap labor and material.

I do not mean that he may not set up the plea.

Commissioner Tate: I understand nothing has been said about that orally here today, and I wondered if it had not been abandoned.

[fol. 773] Mr. Widell: There isn't a line in this record that has a thing to do with that in Docket 3985.

Now, it was stated in Docket 3511, and I can hang my head, perhaps——

Commissioner Tate: Do not waste any time on it.

Mr. Widell: It was stated in Docket 3511, and I can hang my head, perhaps, perhaps it has been true in the past. Today there is a small difference in favor of southern labor. Generally in the coke game it is about 5 cents an hour,

between 25 cents and 30 cents, as it were, and a difference, as it were, and that when contrasted with the heavier handicap that we are under.

Now then, the rate burden that these northern shippers do not want and say that they cannot bear, they want us, they want the southern shippers to bear that burden, and like Atlas of old, carry the world on our shoulders.

Now, what are the conditions surrounding our movement, and this part of the record; the record shows positively that there is not a southern producer that can go into the northern markets and underbid his northern competitors. It is part of the Fair Trade Practices under all of our working codes today, one producer cannot go into another man's market and beat down his price. He must make his sales arrangements; he must plead his quality and other factors if he would sell the goods.

[fol. 774] There are other factors besides freight rates that go to the selling of coke and coal and everything.

As I say, how unfair for them, as it were, to load us down with the burden of Scale 3; how high it is. Furthermore, their general level, I mean the limits of their traffic, is about up to our own, 300 miles. Most of it is 100 miles, or 150 miles, and stops at 300. Some of it is 350, but it is negligible.

Now, they have got a level of rates within that 300 miles that seems to be satisfactory to them. Now, we know that this Scale 2 is relatively high in the upper levels, beyond 300, and 400 miles, and if applied to traffic from the South reflects such high advances for the long hauls from the South, Chattanooga must go 338 miles to Cincinnati; Birmingham 400 miles before it gets a level, and yet Scale 3, as it were, is supposed to be an easy task for us.

Today, conditions have changed entirely from what they were in 1933. All that the record contains of the statistics of the Government's Bureau of Mines, and so on, for 1933, is absolutely obsolete today so far as testimony goes.

1934 has seen a complete revolution, so that when we get back to transportation standards and conditions, they are really on safe grounds because transportation standards [fol. 775] including cost of service and value of service.

There is something my friends and myself overlooked, transportation conditions, operating conditions include

only one cost of service which may be demanded, measured by the value of service which is part of transportation standards. And whenever southern carriers come to this Commission and request, not that you act for them, and may I say this, in closing, that this honorable body must use different language when it speaks to me as a shipper than it uses when it addresses the carriers.

In the southern case your Honors said that you had no power to equalize opportunities or abilities. That is true. The southern carriers, all carriers, have that power though, and they are not even compelled to ask this honorable body to distinguish for them between the rights of carriers and the powers of this Commission.

Thank you.

Chairman Lee: Mr. Day, you have about 15 minutes remaining.

Reply Argument of L. P. Day, on Behalf of Central Freight Association Carriers

Mr. Day: May it please the Commission, I want to correct a statement by opposing counsel, Mr. Cronk, who charged me with having admitted that Scale 3, the higher scale, is in my opinion a maximum reasonable — the South [fol. 776] to the North.

To say the least, Mr. Cronk is mistaken; the record does not bear that out.

Mr. Cronk: I say that anything higher than Scale 2 from Chattanooga to Central Freight Association Territory is unreasonable, in violation of Section 1, based on the evidence in this record. I would like to have that correction, sir, thank you.

Mr. Day: If the Commission please, I do not think the Commission has been misled in all that has been said about the Central Freight Association lines and their obligation to accept the same revenue on southern traffic as they get on traffic moving within their own territory. Mr. Widell has just cited the case of movement from Ashland to Chicago. Well, in the first place, the Chesapeake & Ohio has its own lines from Ashland to Chicago, and it is not conceivable that that road is going to surrender the traffic at Cincinnati to a competitor and divide the revenue. The logical inference is that the C. & O. is going to retain the

business and collect the entire amount of the rate of $3.55 under the scale which you prescribed.

On traffic coming from Chattanooga, if it happened to move over one of the Central Freight Association lines, we would get our proportion of the through rate whatever the southern lines would allow us.

[fol. 777] Now, there isn't anything in this record about what the amount of that division would be, and there is no basis, no foundation, for the statement that has been made here today about the C. F. A. lines getting just as much on one class of traffic as they do on the other.

Commissioner Tate: I gave an illustration this morning when you were talking, taking the mileage from Lynchburg to Cincinnati, 471 miles, and Birmingham to Cincinnati, 480 miles.

Now, assuming that there is any coke from Lynchburg, which there may not be, should the New York Central get any more for carrying that coke that came from Birmingham than it would the coke that came from Lynchburg?

Mr. Day: If it came down to a question of what the New York Central should get for the service it performed, no, there should not be any difference, but that is not the question you have here and the way it has been put up to you is entirely fallacious and misleading.

After all, what you have before you here is a set of joint through rates. How those rates are going to be divided, no one knows, and so far as this proceeding is concerned, no one cares. The point is that the rates in these suspended tariffs are maximum reasonable rates and no one on the other side had the effrontery to get up here today and say that they were not. Being maximum reasonable [fol. 778] rates, the Central Freight Association lines, as partners to those rates, are entirely within their right in demanding that those rates be maintained at the full level of the scale, the same as rates applying within Central Territory are applied on the level of the Central Territory scale, without exception, that is, without any important exception.

This Commission would not have the power in the first instance to initiate rates below a maximum reasonable level and say to the Central Freight Association lines, "We require that you join in rates that are less than maximum reasonable rates, and not having the power to initiate them,

by the same token you cannot compel the continuance of rates that are below the maximum reasonableness."

That has been the finding in any number of cases, the Commission has said that it will not interfere with managerial discretion so long as the resultant rates do not transgress any provision of the Act.

Now, there isn't before you here today any violation of the Act shown. Dependence is placed by our opponents on Sections 3 and 15(a). So far as Section 3 is concerned, the record is in the same state as it was in Docket 3511, and in fact, there is not as much evidence bearing on undue prejudice and undue preference under Section 3.

So far as Section 15 (a) is concerned, there is nothing [fol. 779] in the record of a substantial nature that would tend to show one way or the other that traffic would be diverted or checked or deflected from one origin to some other origin.

On the other hand, there is much evidence in the record showing that the movements that are being circumscribed under the present rate adjustment are those within Central Freight Association Territory.

The Central Freight Association shippers have been driven from important markets on the Ohio River. Our southern friends have a monopoly of that business. They have got the coal and the raw materials adjacent to their plants or within a few miles of their plants, and they have low operating costs, and they are able to undersell the northern shippers.

They not only have a monopoly of that territory in Evansvills and Louisville and Cincinnati, but they are able to ship throughout Central Territory; they ship into the Dominion of Canada; they ship to the Pacific Coast; and our C. F. A. shippers, on the other hand, are limited to the area within a short distance of their plants.

Commissioner Meyer: Mr. Day, what do you say to Mr. Norman's contention, as I understand him, that the rate covering a movement from Birmingham to Cairo, for instance, a distance of 200 miles, includes an arbitrary, say, [fol. 780] an increment, say, of about 35 cents, while a rate substantially higher for some point beyond contains an increment again or an arbitrary substantially greater than that as shown for the same 200 miles?

Mr. Day: I think it is a necessary concomitant for a rate adjustment where the traffic passes through a number of

gateways. We know that Cairo is a point a little farther to the south, it is within 125 miles of Memphis, and if you were to draw a line an equal distance south from Cincinnati, it would bring you to a point near the Kentucky-Tennessee line. When you have situations like that to deal with, with one set of railroads operating through Cairo, as the Mobile & Ohio and the Illinois Central do, and one set operating through Evansville, as the Louisville & Nashville does, and through Cincinnati and Louisville, as the L. & N. does, and the Southern, perhaps, running in differing directions and with varying mileages, up to those gateways, and corresponding diminution in the mileages northbound from the gateways, you are bound to have situations such as Mr. Norman cited; you can't get away from it.

The effect of adjustments is to insure uniformity of treatment via all routes and via all gateways. The rate from a given origin to a given destination will be the same regardless of how it moves.

[fol. 781] To get back a minute to the power of the Commission to force Central Territory lines into partnership in rates that are below a reasonable maximum, the Commission has said in a number of cases involving combination rates, whether combinations of locals or combinations of proportionals, that a shipper has no interest, particularly, in what the membership of one or the other of those factors would be, and the Commission has said in such cases it would look to the measure of the through rate to determine whether the charges paid by the shipper are reasonable or not.

Now, if that be true, with how much less right can the Commission impose a joint through rate in respect to the divisions as to which the record is entirely silent and as to which we do not know what the earnings of a particular carrier are going to be via one gateway or another?

There is absolutely no foundation for such a finding. And on the question of looking only at the through charge in dealing with combination rates, I can cite the case of New Orleans Chamber of Commerce in 77 I. C. C. 664, 667, and 152 I. C. C. 761, at 763.

Our southern carrier friends have referred to the discrimination arising out of Illinois rates, but those rates are chargeable directly to the originating lines here. Certainly they cannot be held to complain of a wrong that they them-

[fol. 782] selves are responsible for, and yet that is what

they are doing when they point to the Illinois rates. They have the power to remove any discrimination arising from those Illinois rates by changing the tariff.

Commissioner Farrell: I do not think you answered Commissioner Meyer's question quite right. I understand that the discrimination about which Mr. Norton complained, was brought about by the fact that this Column 3 not only requires the carriers in the South to charge Column 3 as compared with Column 2 in the North, because of the higher rated territory from which they pass from the South, but requires them to continue that higher rate when they get into Official Territory to point of destination.

Mr. Day: That is not the way it works out. You can pick out an example showing that is the way it works; that is not the way—you must examine the rate or the rate adjustment; you have got to examine it in its entirety and consider it by Cincinnati as well as Cairo.

Commissioner Farrell: I agree with you that the rate from point of origin to the point of destination would be greater, but when they pass from the higher rated territory to the lower rated territory, they ought not to continue to charge in the lower rated territory the level of the higher rated territory.

Mr. Day: No, we would be very glad if the Commission [fol. 783] would permit us to return to the combination method of making rates. Just so we get our revenue, we have no concern with what the southern lines do. If any division they get before they complete the through transportation is inadequate, if they aren't making enough money, let them not complain as to shippers who are foreign to their own lines.

In that connection let me say that there is no intention or idea on the part of the northern lines to be sectional. They regard themselves as having a national status and catering to every shipper in the United States. We handle traffic from the Pacific Coast, as well as we do the New England and the Southern Territories, and we do not want to be stamped with any attack of sectional adjustment, because we are not working that way.

We are only asking here that the transportation conditions be considered, and what the value of the service warrants, and we think that your decision in Docket 3511 has fixed the fair and reasonable and non-discriminatory basis.

Now, something was said about freezing, and there again our opponents are trying to mislead you. As a matter of fact, there aren't any such rates involved here, their rates over northern Ohio points were reduced, or at least placed at the level of the scale rates, so that there was no occasion [fol. 784] for them to effect any concurrent — because if there were increases to be made, they have no particular connection with any southern lines.

Now, there are a number of other things that I would like to touch on, but I think that every contention that has been made here, as to which you will find a full and sufficient answer in the decision in I. & S. Docket 3511. Every one of these contentions were made there and they are discussed by Division 4, at considerable length, and we ask therefore—I would like to say this, too, that if the Commission did not permit the suspended tariffs to take effect, that it could only result in chaos and confusion, you would have one rate applying one place and some other rate applying in another, and another applying somewhere else.

The probable result would be rate wars, with further depletion of the carriers' revenue, and goodness knows, they are sadly in need of all the revenue they can get these days, so we ask that the Commission approve the suspended tariffs as soon as possible and discontinue this proceeding.

Commissioner Farrell: I think you ought to answer what Mr. Norton said in connection with that; he said if these suspended rates are allowed to become effective, that will authorize those rates from the South to the North, while the northern carriers will still be free to put in rates in the [fol. 785] North to the South lower than the maximum that now exists.

Mr. Day: If the northern carriers should, if the proposed rates become effective, to reduce their rates within the North, the southern shippers or carriers could ask for suspension of those rates, and they could be dealt with by the Commission, but there is no intention, there is no disposition on the part of the northern carriers, and none was hinted at anywhere in this proceeding, to depart from the scale.

I think this Commission is aware of the fact that a number of mileage scales have been prescribed by you for application throughout Central Territory and that they are being almost religiously observed by the Central Freight

Association carriers, so I do not believe there is any danger of such conditions arising as Mr. Norman predicts.

Chairman Lee: Mr. Cronk, you have seven minutes.

Reply Argument of A. B. Cronk, on Behalf of Citizens Gas Co. of Indiana, et al.

Mr. Cronk: So far as freezing rates are concerned, Mr. Commissioner Farrell, I don't think that any carrier, by any action of its own, can freeze the rates. A rate is prescribed by either an injunction of a court or by the Commission, who fixes the maximum and minimum bases. If [fol. 786] they fix a rate as both maximum and minimum, then, of course, the Commission would freeze the rate, but suppose that the carriers do decline to join in these rates and thus freeze the rates to the Column 3 basis, that does not mean that the rates may not be demanded, they are not frozen in the sense that any shipper has lost any rights in an attack on those rates.

So, I think there is nothing in that.

Now, Mr. Norton said the further you went into Southern Territory, the greater the difference was, and he complained about that. The same contentions were made in I. & S. Docket 3511, and the Commission declined to reopen it, and in order that I may say rapidly what I wanted to say about that, I would like to read what I said about that situation in the brief that I filed in opposition to the motion to reopen.

"It is complained that the scale rate from Birmingham to a point 50 miles beyond Cairo is 35 cents higher than the C. F. A. scale rate for a similar distance, but when the destination is 220 miles beyond Cairo, the Birmingham scale rate is 45 cents higher than the C. F. A. scale rate for the same distance. The point which the Alabama producers attempt to make is that the haul through Southern Territory being constant, there could be no reason for making a greater spread in the rates when the distance is [fol. 787] farther from the Ohio River. However, the Alabama producers overlook the important fact that when the destination is, say, 220 miles from Cairo, Cairo is not the only gateway through which the traffic can pass, and if the traffic moves via Louisville, Evansville, or Cincinnati, then the haul in the South is substantially longer than via Cairo. In other words, the tendency of the overhead

scale is to equalize the rates to C. F. A. Territory via the different river crossings, which we believe is fair and equitable. On the other hand, if the rate via Cairo to a given destination in Central Territory were lower than via other gateways, the traffic would move via the low density roads serving Cairo, or the rates via the other gateways would be lowered to meet the lower rates via Cairo, thus permitting the Alabama complainants to escape the burden involved in the additional haul from Birmingham to other river crossings."

In other words, where the Ohio River runs southwesterly and you reach it at the near point and the intermediate points and the far points, and get into this territory, then we think that you have either got to do one of two things: Provide for an equalization by tariffs or make your overhead rates to Central Territory which will in themselves tend to equalize the rates for any gateway through which they pass.

[fol. 788] Furthermore he says that is an unusual situation. The Commission has never done that before. I found these cases in which exactly the same thing was done, so apparently there was no difficulty in publishing the rates: Southern cement rates, 133 I. C. C. 424; Knoxville Freight Bureau livestock to the South, 161 I. C. C. 396; Eastern Livestock Case, 144 I. C. C. 731. And in that Eastern Livestock Case, incidentally, they prescribed for 700 miles 56.5 cents and for 700 miles in Central Territory, 46 cents, or about 25 per cent spread.

Now, the spread in these rates is 10 per cent.

Asphaltic limestone, 194 I. C. C. 273; 17,000, Part 3, cotton (Mississippi Valley to Official), 165 I. C. C. 595.

Now, I want to say this, too, that if you go back and put into the rate the 10 per cent differential in it, what we call the laminated scale, and you try to observe the same rate as has been established under Column 3, it would take only a 12.5 per cent difference at the river, whereas we contended in the case before that it ought to be 20 per cent. But if you put 20 per cent arbitrary on the river and then the Central Freight Association scale beyond, there is about, say, a 14 per cent overhead spread there; the rates would not vary at any given destination, and it does not produce any great variation in the rate by using this method.

[fol. 789] I want to say this, too, that they complain about being shut out, that the Column 3 rates shut them out of Central Territory markets.

Well, their evidence shows that to Aurora, they have shipped 6,000 tons at rates which were 14 cents over the scale, over the Column 3 scale. Mr. Norman says just a few shipments to Aurora are in here. They shipped 2,400 tons to Mattoon, where the rates were 39 cents over the Column 3 scale, so that there is quite a number of those situations where they moved tonnage at rates 14 cents over the scale.

So that there has been no guilt established that we can perceive, and no difficulty in the southern fellows getting into this territory at rates higher than the Column 2 scale.

Furthermore, Mr. Neal told me from the witness stand that they shipped coke up into Canada at combinations of the local rates, and the Southern Territory has never shipped a pound of coke into that territory, yet the coke moves right up through and into Canada.

It is shipped all over the world, shipped to the west coast, and there isn't a place where we ship coke that we have not competition; we have no territory in which we sell coke that we do not have competition. Of course, the tendency of coke is towards the west coast; you cannot [fol. 790] ship coke towards the mines, so that the coke moves toward the west.

Mr. Collin said he had to leave the room and he had about seven minutes left.

Chairman Lee: You may have a couple of minutes, if you wish.

Mr. Cronk: No, I just want to leave this thought with you, too, with reference to the arbitrary.

Now, you remember that Mr. Norman, what he said about the establishment of rates, that probably where the scale was written as an overhead scale, it was higher than the Central Territory scale that there is a probability that the Commission could not compel the carriers to go below the Column 3 basis, but he said if you had done what he wanted you to do and that is to write arbitraries up to the river, then it could be done so that, of course, what he did mean to say was that if you would turn around and rewrite your scale so that he would have arbitraries, then he can beat the rates, because the southern carriers would not put the arbitrary on.

So that if you did the fair thing in Docket 3511, you ought not to try to undo it now, because as soon as you let the door open the southern fellow will shoot through.

So this looks like now, according to Mr. Norman, according to Mr. Norman's argument, the very thing that you [fol. 791] should do if we are entitled to have that basis of rates from the South to the North.

I just want to say in closing, and this is the last thing I will say, that the present rate—I just want to say to you and show you what the situation would be if you formed the suspended *the* rates here, that the present rate from Chattanooga to Toledo is $3.28; that is our present rate.

The proposed rate is $4.35. The through distance is 534 miles. Now, they have a rate today which is $1.07 below the Column 3 basis and it is 67 cents below the Column 2 basis, so that if the suspended rates were left in there it certainly would be a preferential rate.

Our brief sets out all of these rates where they are now less than the scale, and we have many illustrations there, for instance, where you prescribed Column 3 to, say, Aurora, Illinois, which required a reduction to Aurora, and then over in Indiana, at Michigan City, where the distance is about the same, the Birmingham rate is 35 cents below the Column 3 basis, so that if you suspend these rates you have got us in the position of competing at Aurora with Column 3 rates from Birmingham and up at Michigan City with rates 35 cents below the Column 3 rates, and there are many inequalities in that situation, just about as many as there are [fol. 792] rates involved in this proceeding. Thank you.

Chairman Lee: Mr. Hollopeter, you have five minutes.

Reply Argument of H. A. Hollopeter.

On Behalf of the Indiana Consumers Gas Co., et al.

Mr. Hollopeter: I want to touch just briefly on one or two points in the short time that I have.

The southern producers have stressed greatly the fact that they feel that they should have some little consideration, due to commercial competitive conditions.

Touching on that just for a minute, I believe that the record shows their operating costs, their costs of producing coke, including the freight rate inbound, is materially less than the cost to the producers north of the Ohio River. That is not an unusual situation; it is found in every operation

where you have competitive producers, one located close to his raw material which he has a perfect right to do, and he must at the same time expect to pay long haul rates on his finished product. Those rates should be properly related to his competitor's who may locate close to the market and pay a high raw material rate, and consequently being a short distance from the market, pay a lower rate on his finished product.

Now, that is one factor in the situation, but we contend that that is not a factor that the Commission should give consideration to here in fixing the rates on coke from [fol. 793] Birmingham to the North, and I think it is unnecessary to reiterate that the northern respondents' position is not that Birmingham should be burdened with any disadvantage; we are not asking for that at all, but we are asking that—and when I say Birmingham, I mean the southern producers—that the southern shippers should come into our markets on relatively the same basis that we do, and that has been stressed greatly in this argument.

Now, when I say "relatively", I think when this Commission considers relativity, you must consider what is actually involved. Now, I think it is obvious to us that in two differently rated territories, mileage ceases to become a factor of control in the case of the measure of transportation involved. It is analogous in a way to a comparison between rail and water transportation, and this Commission has at times said that it considered that perhaps three miles of water transportation is equivalent to one mile of rail transportation and established the relation or the measure of those two methods of transportation.

Now, to the same extent that transportation conditions are different in one territory from what they are in another, you have to break up, to break down and to convert the mileage to a reasonable index of the volume of service. [fol. 794] Now, that is all that we are contending for in this instance, that when the southern producers come into Central Freight Association Territory they pay rates that are fixed with due regard to all the various factors that have been considered in fixing the northern rates at the same markets, and when that is done we ask nothing additional.

Now, as to the overhead rate; much has been said here as to the two sets of carriers involved. The basis adopted here in fixing these overhead rates is not exactly the basis

recommended as such in the order in Docket 3511 cases, but they are a method that was proposed by certain parties that would apply an increase or apply a basis on that portion of the haul within the South, and reflect the conditions there and then a basis to that to reflect the conditions in the North.

So that the Commission wisely adopted this plan, which is the more practical plan in applying the rates, and while that basis suggests, whether it was right or wrong in the amount, had in it a 20 per cent higher basis and reflected those different transportation conditions when applied only on the southern portion of the haul, and the Commission's scale takes but a 10 per cent advance, but applied over the entire distance.

Now, as a practical matter, there is very little difference [fols. 795-796] there except as we observe it does bring it out, that is, these situations.

Chairman Lee: This closes the argument, gentlemen.

The case is submitted and the Commission will now adjourn.

(Whereupon, at 4:10 o'clock p. m., the arguments in this matter were closed.)

[fol. 797] PLAINTIFFS' EXHIBIT 6

IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Equity. No. 15266

THE BALTIMORE AND OHIO RAILROAD COMPANY et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA et al., Defendants

AFFIDAVIT OF ROY S. KERN

Roy S. Kern of the City of Pittsburgh, County of Allegheny, Commonwealth of Pennsylvania, being first duly sworn on oath deposes and says that he holds the position of Chairman of the Central Freight Association Coal, Coke and Iron Ore Committee, and that said committee is a volun-

tary organization composed of railroads operating in Indiana, Ohio, Michigan and other states, which railroads are the plaintiffs in the above-entitled proceeding;

That the Southern Freight Association, with headquarters and principal offices in Atlanta, Georgia, is a voluntary association composed of railroads operating in Alabama, Tennessee and other states south of the Ohio River and east of the Mississippi River, including such lines as the Louisville and Nashville Railroad Company, Alabama Great Southern Railroad, Cincinnati, New Orleans and Texas Pacific Ry., Illinois Central Railroad, Mobile and Ohio Railroad Company, and the Nashville, Chattanooga and St. Louis Ry.;

That under date of September 23, 1936 affiant received by the United States Air Mail in the ordinary course of busi- [fol. 798] ness a letter addressed to him dated September 22, 1936 by J. E. Tilford, the said Tilford being Chairman of the Southern Freight Association aforesaid; that the said letter is attached hereto and marked Exhibit "A".

Affiant further states that on or about March 24, 1936 affiant received copy of petition filed with the Interstate Commerce Commission in the proceeding known as its Docket I. & S. No. 3985, Coke from Alabama and Tennessee to Central Territory, by the Tennessee Products Corporation et al., requesting modification of the said Commission's order in its Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, and for further specific findings therein; that copy of the said petition is attached hereto and marked Exhibit "B";

Affiant states that under date of March 31, 1936 there was served upon him copy of petition filed with the Interstate Commerce Commission by the Alabama Iron and Steel Shippers Conference in support of petition of the Tennessee Products Corporation et al., as aforesaid; that copy of said petition of the Alabama Iron and Steel Shippers Conference is attached hereto and marked Exhibit "C".

Roy S. Kern.

Subscribed and sworn to before me this 15th day of October, 1936. L. E. Matthews, Notary Public. My commission expires June 19, 1938. (Seal.)

[fol. 799] EXHIBIT "A" TO AFFIDAVIT

[Stamp:] Coal, Coke & Iron Ore Com. Received Sep. 23, 1936. Pittsburgh, Pa. Cent. Frt. Assn.

Southern Freight Association,

101 Marietta Street

Atlanta, Georgia

3455

J. E. Tilford, Chairman; L. E. Chalenor, Secretary.

S. B. Mitchell, E. K. Bryan, G. S. Rains, J. W. Bray, Standing Rate Committee.

September 22, 1936.-h.

File 6-166-233

Air Mail

I. & S. 3985—Coke from Alabama and Tennessee to Northern Destinations

Mr. Roy S. Kern, Chairman, C. F. A., C. C. & I. O. Committee, 836 Wabash Building, Pittsburgh, Pa. Mr. R. A. Sperry, Chairman, Illinois Freight Association, Chicago, Illinois.

GENTLEMEN:

In connection with revised rates on coke from southern ovens to northern destinations issued as result of the Commission's order in I. & S. Docket 3985, which became effective on August 13, 1936, our attention has been called to the fact that no divisions of these rates have as yet been agreed to.

It seems very necessary and important that an early meeting be held between interested northern and southern lines for the purpose of working out a mutually satisfactory basis of divisions.

In order to offer something definite for your consideration, we suggest that this joint meeting be held in Chicago, Wednesday, October 14.

Will you kindly submit this to your respective committees and advise us early as practicable, also advising just what building and room in Chicago this meeting can be held.

Yours very truly, J. E. Tilford, Chairman.

[fols. 800-802] EXHIBIT "B" TO AFFIDAVIT

[fol. 803] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

Petition for Modification of the Commission's Order Dated February 3rd, 1936, and for Further Specific Findings, on Behalf of Tennessee Products Corporation and Black Diamond Coal Mining Company, Protestants

To the Honorable the Interstate Commerce Commission:

Come now the Chattanooga, Tennessee, shipping interests, Tennessee Products Corporation, operating the by-product coke ovens at Chattanooga, Tennessee, and Black Diamond Coal Mining Company, exclusive sales agents for Chattanooga coke, protestants herein, and respectfully pray the Commission (1) to modify the order in this proceeding entered on the 3rd day of February, A. D., 1936, so as to give more substantial effect to the views expressed by the Commission in the original report herein, 208 I. C. C. 281; [fol. 804] and (2) to make specific findings of appropriate definiteness to express the conclusions of the Commission as contained in said report.

For grounds of said prayer your petitioners would show:

1. That petitioners face the loss of their entire business in central territory markets, with resulting loss of revenues to the respondent southern carriers serving the Chattanooga plant; unless such southern carriers are permitted, as they desire, to establish and publish the column 2 rates as set forth in said report on coke from Chattanooga to destinations in central territory. Any higher basis of rates will effectively exclude your petitioners' coke from these markets.

2. That the order of the Commission, dated February 3rd, 1936, has been construed by official territory respondent

lines as authorizing them to compel southern respondent lines to publish the full maximum basis of rates made by applying the column 2 rates plus the southern arbitraries as set forth in said report; and that they have issued new restricted concurrences requiring the publication of such higher rates from the South, contrary to the views and conclusions expressed by the Commission as contained in said report, and against the express desire of southern respondent lines to establish the column 2 rates from the South. It is respectfully submitted that unless the Commission makes a further specific order requiring central territory respond-
[fol. 805] ent lines to participate in the column 2 rates from the South, the result will be the total and complete destruction of your petitioners' trade in central territory markets, just as effectively as if the Commission had itself decreed such destruction.

3. That the Commission is not only empowered to make the further specific order as hereinafter set forth, but that it is required to do so in order to protect the lawful interests of the southern shippers against the arbitrary and capricious action of the carriers in central territory, respondents herein, in refusing to comply with the views and conclusions expressed by the Commission as contained in said report, with respect to the right of southern carriers to waive the arbitraries for the hauls in southern territory as set forth in the appendix to said report.

4. That the order herein dated February 3rd, 1936, was not fully responsive to the views and conclusions expressed by the Commission as contained in said report, which in effect held that maximum reasonable rates on coke from the South to destinations in central territory would be those made on basis of the column 2 rates, previously prescribed as maximum reasonable rates for application within central territory, plus arbitraries for the hauls in southern territory to be added at the option of the southern carriers. The respondent carriers in central territory continue to refuse to participate with southern carriers in any rates from the South to central territory that do not include the southern arbitraries in addition to the said column 2 rates.

[fol. 806] Your petitioners' entire trade in central territory hangs in the balance, and it is earnestly prayed that

the Commission will afford such necessary and further relief as required under the provisions of the Act. Otherwise your petitioners will suffer irreparable damage and injury from the loss of its business in central territory markets.

The Commission is requested to make the further specific findings and order, to wit:

A

Requested Specific Findings.

1. That the rates on coke from the South to points in central territory on the basis of the column 2 rates would not be unduly prejudicial to shippers within central territory or unduly preferential of southern shippers.

2. That while transportation conditions actually encountered in southern territory by the traffic here under consideration is not sufficiently comprehensive and definite to warrant us in finding that the rates made on the column 2 basis are full maximum reasonable rates, we are convinced and so find that joint rates made by applying the column 2 scale from origins to destinations, and adding thereto reasonable arbitraries, as set forth in the appendix, for hauls in southern territory, are and for the future will be maximum reasonable rates.

3. That the arbitraries as set forth in the appendix for hauls in southern territory should accrue to the carriers in [fol. 807] southern territory, as in the case of an arbitrary authorized for a short or weak line, Southern Class Rate Investigation, 100 I. C. C. 513, 653, and that the assessment of these arbitraries is optional with the southern lines as in Rates on Chert, Clay, Sand and Gravel within Georgia, 197 I. C. C. 215, and findings, page 240 thereof.

4. That to the extent the carriers in southern territory, respondents herein, according as they participate in the transportation, may elect to waive the arbitraries set forth in the appendix to said report for hauls in southern territory, and may, in lieu thereof, elect to establish and publish rates on coke from the South to points in central territory not to exceed those made by applying the rates designated column 2 rates in said report, it will be unlawful for carriers in central territory, respondents herein, according as

they participate in the transportation, to demand or exact, or cause to be exacted for the transportation of coke from and to the points designated herein, rates which will exceed those made by applying the rates designated column 2 rates in said report; and we further find that, in such circumstances, the exaction or collection by the carriers in central territory, respondents herein, according as they participate in the transportation of coke from the South to points in central territory, of rates that exceed those made by applying the rates designated column 2 rates in said report, will subject southern shippers to rates which are, and will be, unjust and unreasonable in violation of section 1, and un- [fol. 808] duly prejudicial to southern shippers and unduly preferential of shippers within central territory in violation of section 3 of the Act.

B

Requested Modification of the Order Dated February 3rd, 1936

The order entered by the Commission on the 3rd day of February, A. D., 1936, in this proceeding, should be modified as follows:

It appearing, That the Commission March 11th, 1935, made and filed its report in the above-entitled proceeding containing its findings of fact and conclusions thereon and entered its order, which said report and order are hereby referred to and made a part hereof;

It Further appearing, That in consideration of a petition filed on behalf of the Alabama Iron & Steel Shippers' Conference, protestant herein, for the issuance of an order to give effect to the findings and conclusions of the Commission as contained in said report, an order was entered on the 3rd day of February, A. D., 1936, which required the respondents herein, according as they participate in the transportation, to cease and desist, on or before March 17th, 1936, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of coke from and to points designated in the order, rates which would exceed those therein prescribed; and it was further ordered that the respondents herein, according as they participate [fol. 809] in the transportation, be, and were notified and required to establish on or before March 17th, 1936, upon notice to this Commission and to the general public by not

less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of coke, from the Birmingham, Ala., district, from origins on the Louisville & Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., and from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan, rates which should not exceed those made by applying the rates designated column 2 rates in said report from the said origins to the said destinations and adding thereto the arbitraries as set forth in the appendix to said report for hauls in southern territory;

And it further appearing, That a petition has been filed on behalf of Tennessee Products Corporation and Black Diamond Coal Mining Company, protestants herein, for the modification of said order dated February 3rd, 1936, to give more definite and appropriate effect to the findings and conclusions of the Commission as contained in said report herein; and the proceeding coming on for further consideration;

It is further ordered, That to the extent the southern carriers, respondents herein, according as they participate in the transportation, may elect to waive the arbitraries set forth in the appendix to said report for hauls in southern territory, and may, in lieu thereof, elect to establish [fol. 810] and publish rates on coke from the South to points in central territory not in excess of those made by applying the rates designated column 2 rates in said report, the central territory carriers, respondents herein, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before —— —, 1936, and thereafter to abstain from publishing, demanding, or collecting for the transportation of coke from and to the points designated in the next succeeding paragraph hereof, rates which exceed those therein prescribed.

It is further ordered, That to the extent the southern carriers, respondents herein, according as they participate in the transportation, may elect to waive the arbitraries set forth in the appendix to said report for hauls in southern territory, and may, in lieu thereof, elect to establish and publish rates on coke from the South to points in central territory not to exceed those made by applying the rates

designated column 2 rates in said report, the central territory carriers, respondents herein, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before —— —, 1936, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of coke, from the Birmingham, Ala., district, from [fol. 811] origins on the Louisville & Nashville Railroad Company and the Interstate Railroad Company, in Wise County, Va., and from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan, rates which shall not exceed those made by applying the rates designated column 2 rates in said report from the said origins to the said destinations, without adding thereto the arbitraries as set forth in the appendix to said report for hauls in southern territory.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

Justification

I

Position of Southern Carriers

The southern carriers, respondents herein, plainly stated their position throughout the entire course of this proceeding, and restated their position in the answer filed by them, dated December 30th, 1935, to the petition filed on behalf of the Alabama Iron and Steel Shippers' Conference for specific order herein. On page 3 of their answer, it was stated:

"As indicated, southern carriers at present maintain rates between points in the South that, on an average, are no higher than the column 2 scale of rates prescribed as maximum reasonable rates for application in official territory. Southern carriers do not want to establish interterritorial rates from the South to the North on the *full* maximum reasonable basis made by the addition of the arbitraries set forth in the Commission's report which would result in higher rates interterritorially than are at present in effect [fol. 812] on intraterritorial traffic *in either the South or the North*. Instead they are anxious to establish, for inter-

territorial application from the South to the North, rates made on the column 2 scale. The Commission, as stated, has found that rates made on this basis would not be unlawful in any respect whatsoever."

And further, on page 9, it was stated for southern carriers:

"In the instant case the rates that the respondents, other than the northern lines which have restricted their concurrences, want to establish have been held to be not unlawful, but said respondents are prevented from establishing these rates because of the action of said intermediate northern lines. The southern carriers, respondents in the instant case, respectfully request that an order be entered requiring said northern lines to furnish southern lines concurrences that will enable them to establish rates on coke from producing points in the South to northern destinations on the column 2 basis of rates, which basis this Commission, in I. & S. Docket No. 3985, *Coke from Alabama and Tennessee to Central Territory*, 208 I. C. C. 281, found would not be unduly prejudicial to shippers of coke within central territory, or unduly preferential of southern shippers nor otherwise unlawful."

II

A Discussion of the Peculiar Situation in Which Southern Carriers Find Themselves with Respect to the Refusal of Central Territory Carriers to Join with Them in Publishing the Column 2 Rates on Coke from the South to Points in Central Territory.

It is axiomatic that where legal rights and remedies exist at law, there must of necessity be a concurrent exercise of power to enforce such rights and remedies. Otherwise government breaks down and law becomes null and void.

One turns then from the broad contemplation of the power and majesty of the law, to consider more closely, in the [fol. 813] light thereof, the present peculiar situation in which southern carriers and shippers find themselves with respect to (1) the views and conclusions of the Commission as contained in the report in this proceeding, where the Commission had under consideration the proposal of southern respondent carriers to apply on coke from the South to points in central territory the column 2 rates set forth in

said report, on the ground that anything higher than that would restrict, if not prevent, the movement of southern coke to central territory, and further that the rates on coke within the South are no higher than those in central territory, and (2) the refusal of carriers in central territory, respondents herein, to join with southern carriers, respondents herein, in establishing and publishing the aforesaid column 2 rates in accordance with the views and conclusions expressed by the Commission herein.

The Commission said, page 290:

"Rates on coke from the South to points in central territory, on basis of the column 2 rates, would not be unduly prejudicial to shippers of coke within central territory or unduly preferential of southern shippers."

With respect to full maximum reasonable rates from the South to central territory, the Commission said, page 289:

"The evidence as to transportation conditions actually encountered in southern territory by the traffic here under consideration is not sufficiently comprehensive and definite to warrant us in finding that the rates made on the column 2 basis are full maximum reasonable rates, but we are convinced that joint rates made by applying the column 2 scale from origins to destinations, and adding thereto reasonable [fol. 814] arbitraries set forth in the appendix for hauls in southern territory, are and for the future will be maximum reasonable rates."

The appendix, page 293 of the said report, contains the arbitraries which are designated by the Commission as "Arbitraries which *may* be added for hauls in southern territory." (Emphasis supplied.) This finding was, of course, predicated upon the showing made by the southern carriers, respondents herein, that, on the theory that southern territory is, and properly must be, considered a higher-rated territory than central territory by reason of traffic density considerations and other transportation conditions affecting operations in the South, they might within lawful limitations demand and exact, even on coke within the South and from the South to central territory, a higher level of rates than within central territory; but that, by reason of circumstances over which southern carriers have no control, both with respect to economic as well as competitive conditions, they may lawfully, and without any restraint, estab-

lish and publish for the transportation of coke from the South to central territory, rates not to exceed the column 2 rates set forth in said report, and which have been prescribed by this Commission as maximum reasonable rates for application within central territory.

In fact, the evidence of record herein shows that economic conditions in the South have acted to hold the rates on coke in southern territory on a lower level than in central territory. It also shows that the transportation burden is differ-
[fol. 815] ently distributed in southern territory compared with other territories. On this point the Commission itself said, page 289 of the report herein:

"We have frequently recognized that the transportation burden is differently distributed in official and southern territories and that, on some low-grade commodities, rates may justly be relatively lower in the South than in official territory, notwithstanding the less favorable transportation conditions. The southern interests contend that there is no justification for interterritorial rates on coke that are higher than the rates in either the origin or destination territory. We have, in several cases where competitive conditions are somewhat analogous to those here presented, prescribed rates from origins in western trunk-line and southern territories to official territory on the basis of the same scales that applied in official territory. American Distilling Co. v. A. C. & Y. Ry. Co., 140 I. C. C. 633; Newsprint Paper Investigation, 197 I. C. C. 738."

And yet when southern carriers, respondents herein, elected to waive the permissive arbitraries for the hauls in southern territory, and proposed to publish rates on coke from the South to points in central territory on basis of the column 2 rates in accordance with the views expressed by the Commission in said report, they were notified by the carriers in central territory, respondents herein, that they would not be permitted to do so but would have to add the arbitraries.

In order to make it impossible for southern carriers to do otherwise, the carriers in central territory revoked all concurrences under which existing rates have been published and maintained, and issued new concurrences under which the southern carriers would be compelled to add the arbi-
[fol. 816] traries for the hauls in southern territory.

In these circumstances the southern carriers and shippers petitioned the Interstate Commerce Commission for the issuance of an order giving effect to the views expressed by the Commission as contained in the said report, and to preserve the rights of southern carriers and shippers. Thereupon the Commission entered the order herein dated February 3rd, 1936. This order failed to give appropriate effect to its views and conclusions, which, as contained in said report, held that the column 2 rates set forth therein, when applied to the transportation of coke from the South to points in central territory would result in rates that would be (1) within the zone of reasonableness, (2) non-prejudicial, and (3) non-preferential.

III

The Restricted Concurrences of Central Territory Carriers

It becomes apparent, therefore, that the instant proceeding now turns on the point of whether the southern carriers are to be left free to dictate their own traffic policies within the scope of said report, or whether carriers in central territory, respondents herein, may lawfully prevent and restrict the exercise of lawful rights on the part of southern carriers.

Having failed to carry their point in this proceeding with respect to their contention that rates on coke, as well as other commodities, should at all times be higher from the [fol. 817] South to central territory than within central territory, and confronted with a finding by the Commission, as contained in the report herein, that the southern carriers may, under section 3 of the Act, lawfully establish and publish the column 2 rates on coke from the South to points in central territory, the respondent carriers in central territory resorted to the expedient method of preventing the publication of such rates by the arbitrary and wholly unwarranted use of the Commission's tariff rules, and have, under the guise of tariff rule 26(g), forced the southern carriers, respondents herein, to publish, against their own will, and directly contrary to the Commission's views as contained in the report herein, rates made by applying the column 2 rates in said report and adding thereto the arbitraries as set forth in the appendix to said report, regardless of the fact that these arbitraries are expressly designated by the Commission as "Arbitraries *which may be*

added for hauls in southern territory," (emphasis supplied), or in other words, as wholly permissive, and the assessment of which is altogether optional with the southern carriers.

In order to circumvent the southern carriers, and get around the Commission, the respondent carriers in central territory have revoked existing concurrences under which rates on coke have been published and maintained from the South to points in central territory, and have filed new restricted concurrences with the Commission setting forth that they will not participate in any schedule containing [fol. 818] rates on coke, in carloads, from the southern origins involved herein to said destinations in central territory any lower "than the mileage scale of rates set forth in column 2, Appendix H, pages 689 and 690 of the report in I. & S. Docket 3511, 194 I. C. C. 640, * * * plus arbitraries for hauls in southern territory as set forth in appendix on page 293 of the Commission's report in the instant proceeding."

The Commission's tariff rule 26(g) reads:

"When a power of attorney or concurrence is revoked, corresponding revision of the tariff or tariffs should be made effective upon statutory notice not later than the effective date stated in the notice of revocation. In the event of failure so to revise the applicable tariff or tariffs, the rates in such tariff or tariffs remain applicable. In the case of joint rates, the line having revoked its power of attorney or concurrence is thereafter entitled to earn its local rates. If the tariff is published by a carrier such carrier will be held liable to the carrier having revoked the concurrence for the difference in charges under the tariff as it is and as it would have been if corrected in accordance with revocation of concurrence. In the case of tariffs published by an agent, the other carrier constituting the through joint route will be held responsible for such difference in charges."

This rule on its face provides nothing more than an orderly procedure in normal tariff relations between connecting carriers, and should have no application to extraordinary tariff situations brought on by decisions of the Commission and conflicting views developed by the separate

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IV

The Law

We turn again to the report of the Commission in this proceeding, and quote, page 290:

"The law is correctly stated by division 5 in American Sugar Refining Co. v. Chicago, B. & Q. R. Co., 169 I. C. C. 557, in which it said:

"Distance and cost of service are not the sole criterions to be considered in determining whether rates are unduly prejudicial. The law does not contemplate that all rates shall be on the same level, different only to the extent justified by distance and cost of service. Its intent is to give the carriers some latitude in fixing rates. It is their province to take into consideration commercial competition and any other facts or circumstances affecting their prosperity. Their prosperity is dependent on the welfare of the communities and persons they serve, and they may maintain rates less than maximum reasonable rates and rates lower than we can lawfully prescribe, so long as they do not unduly prejudice other communities or shippers, or unduly burden other traffic. Preferences and prejudices are not prohibited unless they are undue. To be undue they must be a source of advantage to the party or locality alleged to be favored, and a detriment to the other party or locality. The question, whether they are undue, is one of fact, to be determined by us after consideration, not only of relative distances and transportation conditions, but of all matters which carriers, apart from any question arising under the statute, would treat as calling for a pref- [fol. 821] erence or advantage. Texas & Pacific Ry. Co. v. I. C. C., 162 U. S., 192."

Moreover, in U. S. v. Chicago, M. St. P. & P. R. Co., 294 U. S. 499, the Supreme Court said, page 506:

"There is no suggestion in the report that the rates have been so reduced as to be less than compensatory. True they do not reach the maximum beyond which charges are excessive. On the other hand, they do not pass the minima beyond which charges are too low. *A zone of reasonableness exists between maxima and minima* within which a carrier is ordinarily free to adjust its charges for itself.

Texas & Pacific Ry. Co. v. United States, 289 U. S. 627, 636; United States v. Illinois Central R. Co., 263 U. S. 515, 522. We lay to one side cases of discrimination or preference or rivalry so keen as to be a menace to the steady and efficient service called for by the statute. Interstate Commerce Act, 15a. Those tendencies excluded, "*a carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate making as to it seems best.*" United States v. Illinois Central R. Co., supra." (Emphasis supplied.)

Under the theory of the Interstate Commerce Act the carriers in initiating rates may, if they so desire, adjust them to competitive conditions. Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197. Further, if the carriers are in competition for the business, they may within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. U. S. v. Illinois Central R., 263 U. S. 515, 522.

However, some may contend that the Commission is empowered only to prescribe maximum reasonable rates under sections 1 and 15(1) of the Act, and by this limitation would be without power to issue a lawful order requiring carriers in central territory to join with southern carriers, [fol. 822] respondents herein, in publishing the column 2 rates set forth in said report for the transportation of coke from and to the points designated herein; and that the respondent carriers in central territory might take the position that the column 2 rates plus the southern arbitraries are nothing more than reasonable rates, even though admittedly on a maximum basis, and therefore not unlawful.

Whatever may be said for that contention, it is a fact that undue prejudice may arise from the relation of rates, both or all of which are within the bounds of reasonableness, Colorado Portland Cement Co. v. A. & W. Ry. Co., 142 I. C. C. 597, 603, and to that extent, at least, a rate that would be reasonable under section 1 may be unlawful under section 3, in relation, as stated by the Court, to some other rate.

But we think the whole contention is without merit. What the Commission in principle did herein was to treat the respondent central territory carriers as standard trunk lines, and the respondent southern carriers as weak lines, and prescribe joint rates on the standard trunk line basis,

and added arbitraries for the hauls over the weak lines in southern territory, as in Southern Class Rate Investigation, 100 I. C. C. 513, 653, and, particularly, Rates on Chert, Clay, Sand and Gravel within Georgia, 197 I. C. C. 215, 240, where the Commission held, as was to be expected, that the assessment of the arbitraries was optional with the weak lines.

[fol. 823] The Commission there said:

"We find:

2. That the record does not justify the discontinuance of the authority previously granted in said proceedings to certain short and weak lines to charge an arbitrary of 25 cents per ton in addition to the standard-line scales. *The assessment of this arbitrary is optional with the short or weak line.*" (Emphasis supplied.)

In the other case cited, Southern Class Rate Investigation, supra, after Finding 13 was made to provide for maximum joint rates between the standard lines and the short or weak lines, the Commission said, page 654:

"The above finding will leave the weak lines and the short lines which it covers free to proceed, in connection with the readjustment of class rates in southern territory, in each individual case such arbitraries as they see fit for application to interstate hauls in whole or in part over their lines, * * *."

Further, on page 655:

"* * * we deem it appropriate to express the view that where joint rates between standard lines and weak or short lines are made by the use of arbitraries in the manner above indicated * * * *that the benefit of the arbitrary should accrue wholly to the weak or short line.*" (Emphasis supplied.)

Need it be stressed, with respect to the two cases cited, that it would be unlawful for the standard trunk lines to compel the weak lines to add the arbitraries, and to so restrict their concurrences as to make mandatory what the Commission itself had made optional or permissive? Indeed, would an order even be necessary to enjoin such procedure? Or if an order were needed, would not the Commission be empowered to enter it?

[fol. 824] Insofar as the weak lines in the Sand and Gravel case, and Southern Class Rate Investigation, supra, should elect to waive the arbitraries in order to attract business to their rails, just so much would their shippers be lawfully entitled to the resulting lower rates, of which the standard trunk lines would have no right to deprive them.

Now, with respect to the instant case, and so far as carriers in central territory, respondents herein, are concerned, it is undisputed that the maximum rates which any such carrier may assess, either for local hauls on its own lines, or jointly in connection with other carriers within central territory, are the rates designated column 2 rates in said report.

Obviously, if such central territory carriers participate with each other on basis of the said column 2 rates in the transportation of coke from and to points within central territory, they may not lawfully demand and exact a higher level of rates on other coke transported by them which may originate in the South, unless such higher level should result from the action of southern carriers in adding the arbitraries for the hauls in southern territory as authorized in said report.

We think, therefore, *that the following proposition is* sound:

Proposition:

So far as northern carriers are concerned, any rate level from the South to the North that is higher than within the North on the same commodity, raises a fair presumption of [fol. 825] unreasonableness and unjust discrimination against southern shippers, and the presumption may be rebutted by the northern carriers only on a showing that such higher rates reflect conditions in the South and are governed by circumstances over which the northern lines have no control, and for which they are not responsible; and it follows that if southern carriers disclaim any responsibility for the higher rates and show instead that carriers in the South do not require a higher level, the northern carriers will then be enjoined from exacting such higher rates.

It is apparent, moreover, that an order of the Commission requiring respondent carriers to cease and desist from such alleged unlawful acts would be directed to the group of carriers responsible for the unlawful acts regardless of

whether the order were based on section 1, with respect to the reasonableness of the joint rates, or section 3 in respect of the unduly prejudicial acts of central territory carriers against southern shippers.

But the argument turns back again to the point whether the Commission can reach the present situation by a lawful order requiring the central territory carriers, respondents herein, to cease and desist from obstructing the legal rights of southern carriers to establish and publish, if they so desire, the column 2 rates on coke from the South to points in central territory. We think it can and should do so, both with respect to sections 1 and 3, and even section 2, of the Act, on behalf of southern shippers.

(a) The Commission's power to prescribe rates. Section 15 (1) of the Interstate Commerce Act reads:

"That whenever, after full hearing, upon a complaint * * * or * * * under an order for investigation [fol. 826] and hearing made by the Commission on its own initiative, either in extention of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate * * * demanded, charged, collected by any common carrier or carriers subject to this Act for transportation of * * * property as defined in the first section of this Act, or that any individual or joint * * * practice whatever of such carrier or carriers subject to the provisions of this Act is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, *the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rates * * * or rates * * * to be thereafter observed in* such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, *and shall not thereafter publish, demand, or collect any rate * * * for such transportation * * * other than the rate * * * so prescribed,* or in excess of the maximum or less than the minimum so prescribed, as the case may be * * *."

Further, section 1 reads:

"(4) It shall be the *duty of every common carrier* subject to this act * * * to establish * * * just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating through routes * * *."

(5) All charges made *for any service* * * * shall be just and reasonable, and every unjust and unreasonable charge for such services *or any part thereof* is prohibited and declared to be unlawful * * *." (Emphasis supplied.)

It will, therefore, be seen that the Commission has plenary power to determine and prescribe what will be the just and reasonable joint rates to be observed.

This includes (1) the specific just and reasonable rate or rates thereafter to be observed, (2) the maximum or mini-
[fol. 827] mum, or (3) the maximum and minimum to be charged; and the power to order the carrier or carriers to abstain from demanding any rate (1) other than the rate so prescribed, or (2) in excess of the maximum, or (3) less than the minimum so prescribed, as the case may be.

Moreover, its order may be directed to the carrier or group of carriers responsible for the unjust and unreasonable charge for the services, or any part thereof, performed by it or them (section 1 (5) cited above.) As in the Sand and Gravel case, supra, so here. The standard trunk lines involved therein could not lawfully compel the weak lines to add the arbitraries on sand or gravel for the reason that such standard lines would not perform the service for which the arbitraries were expressly added. The weak lines could add them for the very reason that they would actually perform the service, and would, therefore, be the only carriers that could lawfully demand or require the assessment of the arbitraries. It is not difficult to realize that under such circumstances the Commission would have the power to enter an order directed to the standard trunk lines requiring them to abstain from exacting the arbitraries against the will of the weak lines.

We hold, then, that if the central territory carriers, respondents herein, should exact or demand, or be responsible

for the exaction of, rates or charges which exceed maximum reasonable rates or charges for the services, or any part thereof, performed by them, such rates or charges would be unjust and unreasonable in violation of section 1 of the Act.

[fol. 828] Further, we think that the Commission has the power, and is directed, under section 15(1) of the Act, to determine, as it already has done in this proceeding, what will be the reasonable joint rates, such as those designated column 2 rates in said report, if southern carriers should elect to publish them, and that it is empowered to make an order requiring the carriers in central territory, respondents herein, thereupon to cease and desist from exacting the southern arbitraries, and to abstain thereafter from publishing, demanding, or collecting any rates for such transportation other than those designated column 2 rates in said report, and prescribed as just and reasonable under all the facts of record herein.

(b) Responsibility of carriers participating in joint rates and the scope of Commission's orders under sections 3 and 15(1). If there should exist any doubt concerning the Commission's power under sections 1 and 15(1) to deal individually with one carrier or group of carriers participating with other carriers in joint rates, or to require the removal of obstructions to the establishment of joint rates within the zone of reasonableness, even as herein on basis of those designated column 2 rates in said report; if this should be questioned on the grounds hereinbefore set forth, or for other purportedly valid reasons, there can be no question whatsoever respecting the power of the Commission under sections 3 and 15(1), and even under section 2, of the Act, to order the removal of any undue [fol. 829] prejudice or preference, or any unjust discrimination, caused by one carrier or a group of carriers participating with other carriers in joint rates.

Section 3(1) of the Act declares:

That "*it shall be unlawful for any common carrier* • • • to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or *to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreason-*

able prejudice or disadvantage in any respect whatsoever." (Emphasis supplied.)

Section 15(1) gives to the Commission plenary power to remove any such "unjust discriminatory or unduly prejudicial" joint rates, by ordering the carrier or carriers to cease and desist from the violation, and by prescribing just and reasonable joint rates to be observed by the carriers concerned.

In the Central Railroad case, 257 U. S. 247, the Supreme Court said, page 259:

"'It is urged that, while the undue prejudice found results directly from the individual acts of southern and midwestern carriers in granting the privilege locally, the appellants, as their partners, make the prejudice possible by becoming the instruments through which it is applied. Discrimination may, of course, be practiced by a combination of connecting carriers as well as by an individual railroad; and the Commission has ample power under section 3 to remove discrimination so practiced. See St. Louis Southwestern Ry. Co. v. United States, 245 U. S. 136, 144. *But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination;* • • • Penn Refining Co. v. Western New York & Pennsylvania R. R. Co., 208 U. S. 208, 221, 222, 225. Compare East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 18. If this were not so, the legality or illegality [fol. 830] of a carrier's practice would depend, not on its own act, but on the acts of its connection carriers. • • • What Congress sought to prevent by that section, (3), as originally enacted was not differences between localities in transportation rates • • • *but unjust discrimination between them by the same carrier or carriers.*" (Emphasis supplied.)

Looking at the present situation from this point of view, it will be seen that the crux of the whole matter is the unjust discrimination practiced by the central territory carriers, respondents herein, against the southern shippers of coke. They, the central territory carriers, do for shippers within central territory what they refuse to do for southern

shippers. They perform exactly the same, or similar, services for both groups of shippers. If informed that the southern arbitraries should not be added, either by reason of the fact that the general rate level on coke in southern territory is the same as or lower than in the North, or because southern carriers may elect to waive the arbitraries, or if for any other lawful reason the southern respondent carriers should decide that the southern arbitraries should not be added, then, under such circumstances, it would manifestly be unlawful for such central territory carriers to discriminate against southern shippers by adding the southern arbitraries and thereby to subject southern shippers to a disadvantage prohibited by section 3 of the Act.

The Supreme Court of the United States has often declared that the purpose of the all-embracing language of the statute was to suppress every form of unreasonable discrimination which it was within the power of Congress [fol. 831] to condemn. Merchants Warehousing Company v. U. S., 283 U. S. 501, 512; Louisville & Nashville R. R. Co. v. United States, 283 U. S. 740, 749, 750; The Shreveport case, 234 U. S. 456. In fact, it has been said that discrimination was the principal thing aimed at by the Act, and the purpose of Congress was to cut up by the roots every form of discrimination, favoritism, and inequality. Louisville & Nashville R. R. Co. v. Motley, 219 U. S. 467, 478.

The law does not forbid disparities in rates between localities providing substantial grounds exist to justify the disparities. Obviously, if the southern carriers should, under the conclusions reached by the Commission in the said report, elect to add the southern arbitraries, and thus bring about a disparity in the rate level on coke from the South to points in central territory, as compared with rates charged by central territory carriers therein, no unjust discrimination such as forbidden by the Act could be said to exist. But the facts in the instant proceeding are otherwise. The question then resolves itself into the proposition that no carrier may lawfully charge or exact for itself any greater compensation than it is entitled to for the services it performs for shippers in general.

(c) The central territory carriers' new concurrences are tantamount to a minimum rate order against southern carriers. It is submitted that central territory carriers, respondents herein, are accomplishing by their restricted con-

currences the same results just as effectively as if the Commission had made a specific minimum rate order requiring [fol. 832] the southern carriers, respondents herein, to add the southern arbitraries.

For the Commission to say to the southern carriers that they have the right either to add the arbitraries for the hauls in southern territory, or to waive them, at their own option, and that the arbitraries could not lawfully be demanded by any other group of carriers, but at the same time to confess that it had no power to enforce such lawful rights of southern carriers to waive the arbitraries if they should so desire, regardless of the fact that the resulting rates would be within the zone of reasonableness, would be a travesty on justice and a mockery of the law. If the Commission is not directly prepared to issue a minimum rate order, it should not permit the central territory carriers, respondents herein, to accomplish this indirectly.

But it is clearly apparent that no ground exists for a minimum rate order herein, in accordance with Texas & P. Ry. Co. v. United States, 289 U. S. 627, where the Court said:

"The evidence failed to show that the rates * * * were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was therefore no basis for an order fixing minimum reasonable rates under section 15(1) of the Act."

(d) The rights of southern shippers in the instant proceeding. There are three controlling issues involved herein:

1. The lawful right of southern carriers to waive the southern arbitraries and to establish and publish the column 2 rates on coke from the South to points in central ter- [fol. 833] ritory.

2. The lawful right of southern shippers to the advantages of the column 2 rates as an incident of, and hence dependent upon, the right of southern carriers to maintain such rates.

3. The duty of the Commission to protect such rights of southern shippers, under sections 1, 2, and 3 of the Act.

If the southern carriers have the right to waive the southern arbitraries, then southern shippers are entitled to an order from this Commission protecting their enjoy-

ment of the rates which the southern carriers desire to maintain.

In order to distinguish clearly between the legal independent rights of shippers under the law, and those which may be termed incidental rights or advantages as an incident of, and hence dependent upon, the right of carriers to maintain competitive advantages and their continuing desire to do so, we quote what the Supreme Court said in Sprunt & Son v. United States, 281 U. S. 249, that:

"They (shippers) are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled."

This case involved the suits brought, one by complaining shippers, (including Sprunt & Son), the other by railroads, to enjoin and set aside the Commission's order in a proceeding involving rates on cotton from interior points in [fol. 834] the Southwest to Houston and other ports on the Gulf of Mexico. The district court sustained the validity of the order and dismissed both bills for want of equity. Sprunt and the other operators took an appeal to the Supreme Court. The carriers filed their severances and proceeded to establish the equalized rates prescribed by the Commission.

Continuing, the Court said further, with reference to the rate advantage thus lost by the complaining shippers:

"The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under section 3 of the Interstate Commerce Act, for their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit 'wherein is involved the validity' of the order entered by the Commission."

The Court concluded:

"But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shippers only where

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any." (Emphasis supplied.)

Under this theory, or principle of law, if the southern carriers should elect to add the southern arbitraries set forth in the appendix to said report, the only ground on which southern shippers could assail the resulting rates would be under sections 1 and 15(1) with respect to the reasonableness thereof. It is doubtful in our mind if such case could be bottomed on any other section of the law, except possibly section 15a.

And remark here, if that should happen and if exactly [fol. 836] the same rate disparities should thereby be created to the disadvantage of southern shippers as assailed herein, the remedy left to us would not be under section 3 but under sections 1 and 15(1), mainly with respect to the lawfulness of the arbitraries for the hauls in southern territory. No section 3 order would, in these circumstances, lie against the carriers in central territory, for the reason that the responsibility for the higher rates from the South to points in central territory would rest not with them but with southern carriers, who, under the conclusions reached by the Commission as contained in said report, could justify the higher rate level by the lawful need of arbitraries for the hauls in southern territory. If these, on the other hand, could be disproved by southern shippers under sections 1 and 15(1), the continued exaction thereof, particularly by the carriers in central territory, would then doubtless result in a section 3 violation, as well as section 1, on their part, and a violation of section 1 on the part of southern carriers.

On the other hand, if the southern arbitraries set forth in the appendix to said report should be considered proper and valid,—and the Commission has already concluded they are; and if southern carriers, respondents herein, should elect to add them, even though to do so would put southern shippers at a disadvantage, the southern shippers would have no independent legal right to demand their waiver merely for competitive reasons, although competition may be the very ground on which the southern carriers, them- [fol. 837] selves, might elect to waive them.

But to the extent that southern carriers, respondents herein, have elected to waive these permissive arbitraries, and show their "continuing desire to do so", (Sprunt case, supra), it is the plain duty of this Commission under the Act to enforce the right of southern shippers to the resulting column 2 rates, and to forbid the carriers in central terri-

tory, respondents herein, to exact, demand or collect the southern arbitraries in addition to the column 2 rates set forth in said report.

Conclusion

Two things of prominence stand out in this proceeding:

(1) The conclusion reached by the Commission, as contained in the report herein, that rates on coke from the South to central territory made the same as those designated column 2 rates in said report would be within reasonable limits and not otherwise unlawful; and in consequence thereof the expressed desire of respondent southern lines to publish such rates and at the same time to waive the permissive arbitraries for the hauls in southern territory.

(2) The absolute refusal of respondent carriers in central territory to observe the column 2 rates from the South, either in response to said report, or to the demand from the southern carriers, or the Commission's maximum-rate order of February 3rd, 1936, herein.

It was hardly to be expected, however, that the central territory respondents would voluntarily do under the maxi-[fol. 838] mum-rate order what they had positively refused to do under the report itself and in the face of the clear and definite views expressed by the Commission therein. They have in effect said that they will compel the southern carriers to add the arbitraries for the hauls in southern territory regardless of what the Commission may have concluded or what the southern carriers might want to do either under the provisions of the report itself or the maximum-rate order of February 3rd, 1936.

The supreme challenge came from respondent central territory carriers in the form of revocations of existing concurrences and the issuance of new restricted concurrences in which they openly and defiantly assumed full and undivided control of the managerial discretion and rate-making policies of the southern respondent carriers with respect to these rates.

The tragic thing to your petitioners is that this will spell the ruin of their entire trade in central territory. It was confidently assumed, when the report herein was first released and given consideration, that here at last was a decision which properly gave to southern carriers the exercise

of their lawful right to determine for themselves without restraint from carriers in central territory just what they would or would not do with the arbitraries for the southern portion of the hauls. Or was it after all but another Pyrrhic victory?

It is submitted that the time has come for a definite show of the Commission's power. May we very respectfully but [fol. 839] candidly say to the Commission that it would be but mockery, and making play of your petitioners' plight in the threatened loss of their central territory trade, for the Commission to hold and express the views and conclusions as contained in its report herein, unless it is prepared to give effect to them by findings and orders of sufficient and appropriate definiteness?

Failing in this we shall be made to realize the bitter yet devastating truth that ours of the South is indeed a lost cause.

Oral argument before the whole Commission on the matters herein is requested.

Respectfully submitted, Tennessee Products Corporation, Nashville, Tennessee. Black Diamond Coal Mining Company, Birmingham, Alabama, Protestants, by C. E. Widell, 14 Cummins Station, Nashville, Tennessee, for Protestants.

Dated at Nashville, Tennessee, March 18th, 1936.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing copy thereof properly addressed to each other party.

Dated at Nashville, Tennessee, this March 18th, 1936.

C. E. Widell, Of Counsel for Protestants.

[fol. 840] EXHIBIT "C" TO AFFIDAVIT

[fol. 841] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket 3985

Coke from Alabama and Tennessee to Central Territory

The southern respondents, through no fault of their own, have been caught in a vise from which there is no avenue

of escape for them, unless the Commission will take cognizance of their plight and issue a definite order to give full force and effect to the clear and unmistakable findings and conclusions in the report herein.

That the order issued by the Commission on February 3, 1936, as amended February 26, 1936, was not responsive to the petition upon which it was issued has now been demonstrated by the unusual action of the northern respondents in so tying the hands of the southern respondents as to make it impossible for them to exercise any discretion whatsoever.

The northern respondents take the position that they cannot be compelled to join in less than maximum reasonable rates; that the Commission has prescribed as maximum reasonable rates the Scale 2, plus arbitraries for southern carriers, and that therefore the northern carriers have the right to require the southern carriers to add the arbitraries. By restricting their concurrences so as to apply only where arbitraries are added, the northern carriers are in effect issuing a minimum rate order to govern the southern carriers. Conceding, for the sake of argument, that the northern carriers cannot be expected to join in less than [fol. 842] reasonable maximum rates, such rule can be applied only to reasonable maximum rates in so far as such carriers are concerned. In this case the Commission has expressly held that the Scale 2 rate is a reasonable maximum rate in so far as the northern carriers are concerned. but with reference to the southern carriers has authorized but not required them to add arbitraries to such scale for their part of the haul. The Commission expressly held not only that the Scale 2 rates were proper maximum rates in so far as the northern carriers are concerned, but has expressly held that such rates would not be prejudicial to the shippers of coke served by said northern carriers or unduly preferential of southern shippers (R. 290). Under these circumstances to permit the northern carriers, by their concurrences, to prescribe minimum rates for the southern carriers is not only to delegate to the northern carriers the power of the Commission but is to permit them to execute such delegated power in a way that the Commission itself has declined to execute it. In numerous other cases the Commission has issued orders prescribing a scale as reasonable maximum and authorizing certain carriers to add arbitraries thereto and in no case has such an order

been construed as permitting connecting carriers to require the arbitrary to be added as a condition of their participation in the rates. Such orders by their terms provide that the authorized arbitraries shall accrue to the short or weak lines and it has always been recognized that the short or weak line could waive such arbitraries where in their judgment it was necessary to do so in order to move the business. To interpret such orders otherwise is to give the power to the strong lines to exercise a managerial discretion for and on behalf of the weak lines. Surely this Commission will never adopt such a construction or permit the strong lines to enforce upon the weak lines such construction.

[fol. 843] Among the many cases wherein the Commission has made findings and entered orders similar to the order here sought, are these set out in the Appendix hereto. The cases there cited include arbitraries authorized for so-called trunk-lines, as well as for so-called short lines.

It is true that in the cases cited in the Appendix hereto the Commission did not, by its order, provide specifically that the short or weak line, to which the arbitrary was to accrue, should have the right to waive the arbitrary. Doubtless it never occurred to any member of the Commission that any such question would ever be raised or that one set of carriers would insist upon exercising managerial judgment for and on behalf of another set of carriers. We have such a case here, however, and in order to meet it, it is necessary for the Commission to enter an order which shall clearly provide that the power to decide the question as to whether there shall be added an arbitrary, authorized on behalf of any railroad, shall be vested in the railroad for whose benefit the arbitrary is authorized. Stated another way, in view of the attitude of the northern carriers here, it is necessary for the Commission to specifically provide in its order that the northern respondents shall participate in Scale 2 rates as maximum reasonable rates and that the southern respondents may exercise their own judgment as to whether the arbitraries shall be added.

The Commission has heretofore held that where arbitraries are authorized for short or weak lines their assessment is optional with such lines. Thus, on further hearing in Rates on Chert, Clay, Sand, and Gravel Within State of Georgia, and associated proceedings, (Prior reports 122 I. C. C. 133, 140 I. C. C. 85, 160 I. C. C. 309, 165 I. C. C.

731, and 177 I. C. C. 123), where the following question was in issue:

3. Whether arbitraries, in addition to the scale or scales which may be approved or prescribed as the result of the [fol. 844] further hearing as aforesaid, should be accorded to any so-called short or weak line and, if so, what such arbitraries should be. (197 I. C. C. 215, 218.)

and where certain of the respondents and defendants advocated discontinuance of authority granted in original proceedings to certain short or weak lines to charge an arbitrary of 25c per ton in addition to standard-line scales, the Commission found:

2. That the record does not justify the discontinuance of the authority previously granted in said proceedings to certain short and weak lines to charge an arbitrary of 25 cents per ton in addition to the standard-line scales. *The assessment of this arbitrary is optional with the short or weak lines.* (Emphasis supplied.) (197 I. C. C. 215, 243.)

In conclusion, we feel that we would be remiss in our duty if we did not call the Commission's attention to the fact that instead of following any sort of orderly procedure, the northern respondents have been and are trying to force their will on the Commission, their southern connections, and the southern shippers of coke, protestants.

The Commission's report was rendered on March 11, 1935. Since that date and for more than a year, the outstanding concurrences of the northern respondents have been in conflict with, if not actually in contempt of, that report.

Orderly procedure would have been for the northern lines to have withdrawn concurrences in conflict with the report and to have filed petition, if they were not satisfied with that report, seeking reopening and reconsideration for the purpose of convincing the Commission, if they could, that its findings and conclusions were wrong and should be reversed.

Throughout these proceedings, this protestant has followed orderly procedure and so have the southern respondents. Just why the northern respondents have not filed [fol. 845] petition for reconsideration is not clear, particularly in the light of their action, first, in not withdrawing their concurrences in conflict with the report, and, second,

in their present attempt, through the medium of tariff publication rules, to force their will on the Commission and their southern connections.

This petitioner earnestly requests that the Commission now enter an order requiring the northern carriers to join in rates on the Scale 2 basis and specifically providing that the arbitraries authorized for the benefit of the southern carriers may or may not be added in accord with the managerial judgment of such southern carriers.

Respectfully submitted, A. J. Ribe, General Chairman, Alabama Iron & Steel Shippers Conference. J. V. Norman, Norman, Quirk & Graham, Attorneys for Protestant, Alabama Iron & Steel Shippers Conference.

Dated at Birmingham, Alabama, March 26, 1936.

Address of Counsel: Norman, Quirk & Graham, Kentucky Home Life Bldg., Louisville, Ky. A. J. Ribe, 1911 North First Avenue, Birmingham, Alabama.

[fol. 846] Certificate of Service

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to each party and each party is requested to acknowledge receipt direct to the Secretary of the Commission.

Dated at Birmingham, Alabama, this the 26th day of March, 1936.

A. J. Ribe, General Chairman, Alabama Iron & Steel Shippers Conference.

[fol. 847] Appendix

In Rates on Chert, Clay, Sand, and Gravel within State of Georgia, 122 I. C. C. 133, decided January 21, 1927, after finding that certain so-called weak lines were entitled to an arbitrary of 25¢ per net ton, the Commission issued a definite order to give effect to that finding, as follows:

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 1, 1927, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the

manner prescribed in section 6 of the interstate commerce act and thereafter to maintain and apply to the interstate transportation of sand, gravel (washed or unwashed), clay, gravel, crushed stone, and slag, in straight or mixed carloads, between points in the State of Georgia, and between points in the State of Georgia and points in other States in southern territory, as described in the report herein, except Florida, rates in amounts per ton of 2,000 pounds which shall not exceed those set forth in Table A of said report, *provided, that where the transportation is in whole or in part over either of the so-called respondent short lines set forth in Appendix B, to the report herein, rates shall not exceed those determined under the scales set forth in Table A of said report plus an arbitrary not in excess of* 25 *cents per ton of* 2,000 *pounds, such arbitrary to accrue solely to the short line.* (Emphasis supplied.)

In Consolidated Southwestern Cases, 123 I. C. C. 203, decided April 5, 1927, after making the following specific findings:

17. We find that maximum reasonable first-class (column 100) interstate rates to, from, and between points on the Fort Smith & Western Railway are, and for the future will be, the maximum reasonable first-class (column 100) rates herein provided for standard lines between points in the Southwest, or between points in that territory and other territories, river cities, and gateways embraced in the find-[fol. 848] ings, as the case may be, plus the first-class (column 100) distance arbitraries set forth in Appendix 18 herein, such arbitraries to accrue in their entirety to the Fort Smith & Western * * *.

18. We find that the rates to, from, and between points in Texas differential territory as defined in Appendix 9, and to, from, and between points on the Rock Island line, Tyrone to Texhoma, Oklahoma, inclusive, may properly be higher than the rates for like distances in the Southwest; that maximum reasonable first-class (column 100) interstate rates between points in the said Texas differential territory, between points on the said Rock Island Line, and between points in said territory and on said line, will be those herein prescribed in findings Nos. 16 and 17 for application between points in the Southwest, plus the first-class

(column 100) distance arbitraries set forth in Appendix 18; that on traffic between points in said Texas differential territory and on the said Rock Island line, on the one hand, and points in the Southwest other than the Missouri River cities and the gateways, on the other, the maximum reasonable first-class (column 100) interstate rates are, and for the future will be, those prescribed in findings Nos. 16 and 17 for application between points in the Southwest, plus the distance arbitraries set forth in Appendix 18 for that part of the total haul which is within Texas differential territory or on the said Rock Island line in Oklahoma, *such arbitraries to accrue in their entirety to the line or lines performing the service in differential territory.* (Emphasis supplied.)

The Commission issued a definite order to give effect to such findings, as follows:

It is further ordered, That the last-mentioned defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before December 5, 1927, upon notice as aforesaid, and thereafter to maintain and apply, for the transportation between the points designated in the next preceding paragraph hereof, first-class (column 100) interstate rates which shall not exceed those provided in the "Southwestern scale" of distance rates set forth in Appendix 18 to the [fol. 849] aforesaid report herein, plus first-class distance arbitraries, for application to hauls which shall take place on the line of the Fort Smith & Western Railway, not exceeding those prescribed in the scale of "Differentials for Fort Smith & Western Railway" set forth in said Appendix 18, the said distance rates and arbitraries to be applied as provided in findings Nos. 15 and 17 in said report. * * *

It is further ordered, That the last-mentioned defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before December 5, 1927, upon notice as aforesaid, and thereafter to maintain and apply, for the transportation from and to the points designated in the next preceding paragraph hereof, first-class (column 100) rates which shall not exceed those provided in the "Southwestern Scale" of distance rates set forth in the aforesaid Appendix 18, plus first-class distance arbitraries, for application to that part of

total hauls which shall take place in the said Texas differential territory, not exceeding those provided in the scale of "Differentials for Texas and Oklahoma Differential Territory" set forth in said Appendix 18, the said distance rates and arbitraries to be applied as provided in finding No. 15 in the aforesaid report herein, subject to the grouping provisions of note 3 of finding No. 16 in the aforesaid report herein.

In Sand, Gravel, and Crushed Stone and Shells within the Southwest, 155 I. C. C. 247, decided June 3, 1929, after finding that the Texas Mexican Railway was entitled to an arbitrary, the Commission issued a definite order to give effect to that finding, as follows:

It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate Commerce Act, and thereafter to maintain and apply to the interstate transportation of the commodities, in straight or mixed carloads, described in Appendix 1 to the report made [fol. 850] a part hereof, between points in Arkansas, Oklahoma, Texas, and that portion of the State of Louisiana lying west of the Mississippi River, rates which shall not exceed those determined under the scales set forth in Appendix 2 to said report: *Provided, That where the interstate transportation is in whole or in part over the Texas Mexican Railway, there may be added an arbitrary equivalent to 20 per cent of the rate that would be applicable under the scales set forth in said Appendix 2 for that part of the total haul which is over the Texas Mexican Railway, such arbitrary to accrue solely to the said Texas Mexican Railway.* (Emphasis supplied.)

In New England Cement Rates, 155 I. C. C. 601, decided June 3, 1929, after finding that certain lines in the State of Maine were entitled to differentials, the Commission issued a definite order to give effect to that finding, as follows:

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are

hereby, notified and required to establish, on or before September 16, 1929, upon notice as aforesaid, and thereafter to maintain and apply to the interstate transportation of cement, in carloads, from all producing points in the Lehigh district and from Hudson, Hudson Upper, Alsen, and Howe's Cave to points in Maine north and east of a line from Rockland through Albion, Waterville, Oakland, Farmington, and Rumford, rates, in cents per 100 pounds, which shall not exceed those based on the distance scale of rates in the next preceding paragraph for the through distances, plus the following differentials, in cents per 100 pounds, to be added for the hauls of lines operating in Maine north and east of the line from Rockland through Albion, Waterville, Oakland, Farmington, and Rumford, *such differentials to accrue entirely to the carriers operating north and east of said line in addition to their regular divisions of the through rates under the scale of rates prescribed in the next preceding paragraph* * * * (Emphasis supplied).

In Interstate Amiesite Company vs. A. & R. R. R. Company, 172 I. C. C. 100, decided January 17, 1931, after finding that certain so-called weak lines were entitled to an [fol. 851] arbitrary of 30¢ per net ton, the Commission issued a definite order to give effect to that finding, as follows:

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before April 28, 1931, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the interstate transportation of crushed stone or slag mixed and coated with asphaltum and lime and of sand, gravel, and chert mixed and coated with asphaltum, oil, or tar, in carloads, from and to the points of origin and destination referred to in the second and third ordering paragraphs hereof, over routes embracing any of the so-called short-line defendants named in Appendix C to said report, except such as may be under the common control or management of a standard line, rates which shall not exceed rates prescribed in said second and third ordering paragraphs plus an arbitrary not to exceed 30 cents per ton of 2,000 pounds, *such arbitrary to accrue solely to the short line.* (Emphasis supplied.)

In Smoot Sand & Gravel Corporation vs. al., 174 I. C. C. 735, decided June 5, 1931, a the Chesapeake Beach Railway Company w arbitrary of 20¢ per ton, the Commission i order to give effect to that finding, as follow

It is further ordered, That said defendan they participate in the transportation, be hereby, notified and required to establish, o tember 14, 1931, upon notice as aforesaid, a maintain and apply to the transportation of in carloads, from Georgetown, D. C., to poin Pennsylvania, Virginia, and West Virginia said report, rates in amounts per ton of 2,00 shall not exceed those shown in the followin to the addition of 20 cents per ton for move or more line-haul carriers *and also subject to a 20-cent per ton arbitrary for movements* [fol. 852] *railway of the Chesapeake Beach pany, such arbitrary to accrue solely to th* (Emphasis supplied.)

In Petroleum and Petroleum Products, decided November 3, 1931, after finding t called weak lines and also the Norfolk Sou were entitled to arbitraries, the Commissio nite order to give effect to those findings, as

It is ordered • • • In determining ra made up in whole or in part of any of the sho shown in Appendix 20 to said report of J other than those that are under common con ment with some standard carrier, or of any weak lines shown in Appendix 1 to said supp of July 7, 1931, except the South Georgia Ra Columbus and Greenville Railway, Mississip road, Gulf, Mobile and Northern Railroad Central Railway, an arbitrary of 6 cents per be added, *such arbitrary to accrue solely to ing short or weak line or lines.* (Emphasis

In determining rates over routes made up part of the lines of the Norfolk Southern Ra trary equal to 20 per cent of the scale shown dix 19 may be added for that portion of th Norfolk Southern, subject to a maximum arbi

per 100 pounds, *which arbitrary shall accrue solely to the Norfolk Southern.* (Emphasis supplied.)

[fol. 853] Judge Evans: Is this on a final hearing now we are having today?

Mr. Day: It is agreeable to the Plaintiffs to have this case here on final hearing today.

Judge Evans: Do you stipulate likewise?

Mr. Payne: It is agreeable so far as I am concerned.

Mr. Collins: It is agreeable to me, your Honors.

Judge Evans: Then it is stipulated that this hearing is on final disposition of the case.

Mr. Payne: Yes.

Judge Evans: Any evidence on the other side of the case that wants to be offered?

Mr. Payne: No, we have no evidence.

Judge Evans: Anything further to be offered in the way of evidence?

Mr. Day: I think not on behalf of the Plaintiffs.

Judge Evans: Then the evidence is closed. Proceed with your argument.

Mr. Northcutt: Mr. Day, pardon me just a moment. I have the reply to Mr. Roy S. Kern, whose affidavit was just filed, made to the two petitions that were dealt with in that affidavit, and I would like to file that reply as evidence in behalf of the defendants. I assumed that that would be in [fol. 854] the certified copy of the record before the Commission, but as it was not contained in the record as certified and filed here, and those petitions were put in by affidavit, I would like to tender this reply on behalf of the northern lines to the petitions filed by those southern coke producers, as showing that those petitions were replied to by the railroads who are plaintiffs in this proceeding.

Mr. Day: We have no objection.

Judge Evans: It may be received.

Thereupon the said document so offered and received in evidence, was marked Intervenors' Exhibit 1, and is in words and figures as follows, to wit:

[fol. 855] INTERVENORS' EXHIBIT 1

[fol. 856] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 3985

Coke from Alabama and Tennessee to Central Territory

Reply of Central Freight Association Lines to Petition of Tennessee Products Corporation and Black Diamond Coal Mining Company for Modification of the Commission's Order Dated February 3, 1936, and for Further Specific Findings Herein, Also to Petition of the Alabama Iron and Steel Shippers Conference in Support of Petition Aforesaid

I

Statement

Because the petitions of both the Alabama and the Chattanooga interests are in purpose identical with, and constitute merely a more elaborate but no more convincing restatement of the arguments advanced in, petitions filed by the same interests several months ago, the respondent Central Freight Association carriers will, in the interests of brevity and to avoid repetition, rely principally upon their answer to such prior petitions at this time. For present purposes, they deem it sufficient to point out merely the errors, contradictions and improprieties contained in the several grounds of the prayer in the petition of the Chattanooga interests and the specific findings which they request the Commission to make.

II

Petitioners' Grounds for Prayer

1. These respondents deny that the establishment and maintenance of the reasonable maximum basis of rates as [fol. 857] determined by the Commission herein and prescribed in the order of February 3, 1936 will jeopardize or adversely affect the movement of Coke from Southern producing points to Central Freight Association destinations, and respectfully submit that the evidence herein, as well as in the former proceedings, I. & S. Docket 3511—Coke between Points in Central and Illinois Territories, 194

I. C. C. 640, demonstrated conclusively that such traffic can and actually has moved into Central Freight Association territory on rates much higher than the reasonable maximum basis. In this connection, the Commission should observe the absence of any reference in the petition to evidence tending to prove petitioners' contention which amounts to but a reiteration of many claims made by the same interests in the past without any foundation of fact whatsoever.

2. In the second ground for the prayer, the petitioners infer that the restricted concurrences executed and filed by C. F. A. carriers were the result of a "construction" of the order of February 3, 1936. Attention is directed to the fact that such restricted concurrences were filed with the Commission and parties almost a month before the issuance of that order and also that in the reply of Central Freight Association lines to the prior petitions of the Southern interests the Commission were apprized of the intentions of C. F. A. lines to restrict their concurrences in the inter- [fol. 858] territorial rates involved (See pages 6 and 7 of reply). Thus not only have the petitioners erred in ascribing the filing of the concurrences to a construction of the order of February 3, 1936 but have also seen fit to ignore or overlook the fact that the Commission and the parties of record herein had prior notice of the intentions to this effect. Aside from these mis-statements, the second ground of the prayer differs from the first only by injecting into it the position of the Southern railroads in this controversy, with which the Commission has long been cognizant.

3. These respondents deny that their position and actions have been arbitrary and capricious. It is of record in this case that the position and purpose of C. F. A. carriers are based solely upon their desire to bring about an orderly adjustment of rates from the South properly related to the adjustment of rates which now obtains within C. F. A. Territory, to the end that there may be no possibility of inequalities which may result in undue prejudice and preference. C. F. A. carriers have at no time insisted upon or advocated the maintenance of higher interterritorial rates than the bases found by the Commission to be reasonable, and they have likewise pursued the same consistent policy in the instance of rates within Central Freight Association territory.

4. The fourth ground for petitioners' prayer denotes a total lack of a proper conception or understanding of the [fol. 859] purposes for which the Commission in its order prescribed the so-called arbitraries. It ignores completely the fact that such constitute merely a means of determining maximum reasonable rates from the South to the North in proper relationship to the maximum reasonable basis obtaining within the North as the result of the order in I. & S. Docket 3511, supra. Thus, instead of treating those arbitraries as something with which the Southern carriers are alone concerned, they must be considered as intrinsic parts of joint through interterritorial rates, without which the rates would not reflect a level properly related to that which is in effect within C. F. A. territory. This method of computing interterritorial rates has frequently been prescribed by the Commission. Fertilizer and Materials between Mississippi Valley Territory and Points North of the Ohio River, 151 I. C. C. 613, also Iron and Steel Articles between the North and South, 213 I. C. C. 51. When the so-called arbitraries are correctly considered as but a part of a formula for making whole rates, the interests of C. F. A. carriers are at onee apparent. As partners to joint through rates, the Northern carriers have a vital interest in the establishment and maintenance of an adequate and compensatory rate basis, while as carriers serving both Southern and C. F. A. producers they have a primary responsibility for rates that are non-prejudicial and non-preferential. What has just been stated applies equally to the sug- [fol. 860] gestion made by petitioners (beginning at Sheet 20) that the respondent Southern carriers are weak lines and therefore free to waive the rates in excess of the scale prescribed for application within Central Territory. It should be added, however, that there is no evidence in the record, nor finding by the Commission, tending in the slightest degree to prove that the Southern lines are weaker or stronger than their connections north of the Ohio River. There is, therefore, no basis for petitioners treating them as weak lines or branch lines. The Northern lines are greatly in need of the revenue to be derived from the maintenance of maximum reasonable rates and if the Southern lines were in a position to dictate the measure of joint rates interterritorially and insisted upon something less, it could scarcely be inferred that they were in fact "weak lines".

III

Petitioners' "Requested Specific Findings"

1. The request that the Commission find that the Column 2 rates would not be unduly prejudicial to shippers within Central Territory or unduly preferential of Southern shippers seems wholly unnecessary and the language of the Commission's decision to that effect is quoted on page 11 of the petition. Such, however, does not constitute or can not be deemed the equivalent of a finding on the part of the Commission that maintenance of the reasonable maximum basis, i. e. Scale 2 plus arbitraries, would result to [fol. 861] the prejudice of shippers within Southern Territory and preference to shippers within Central Territory. By the same token a reduction of rates within Central Territory from the maximum reasonable basis now obtaining would not result in undue preference of Northern shippers or undue prejudice against Southern producers if the interterritorial rates were not maintained on the maximum reasonable basis prescribed by the Commission from that territory. These respondents now contend, as they did in their reply to the prior petitions, that undue prejudice or preference can not result where the rates are upon a maximum reasonable basis (Colorado Portland Cement Co. v. A. & W. Ry. Co., 142 I. C. C. 597; Potomac Electric Power Co. et al. v. C. & O. Ry. Co., et al., 152 I. C. C. 641, 652).

2. The second requested specific finding would have the Commission change its definite conclusion as to the maximum reasonable basis for interterritorial rates to one, which would indicate a doubt as to the correctness of the prescribed basis. For the Commission to so change its findings has no support in law and would require that substantial evidence of record relating to variations in transportation conditions in the South and in the North be totally ignored and the substitution of an inference, unsupported by evidence, that such variations in transportation conditions do not in fact exist.

[fol. 862] 3. The contentions in requested finding No. 3 that the Southern roads should be treated as short or weak lines were disposed of hereinbefore.

4. Requested finding No. 4 is self-contradictory and in one of its aspects contradicts the suggested finding No. 2.

It is self-destructive in that in one breath petitioners agree that the addition of arbitraries to the Column 2 basis is proper, subject only to the right of the Southern roads to waive them, while in the next breath they make the categorical statement that rates higher than Column 2 will be unreasonable in violation of Section 1. In its requested finding No. 2 the petitioners have conceded that the Commission might find that Column 2 rates plus arbitraries are and for the future will be maximum reasonable rates. For the Commission to, even if it could possibly, make such contradictory findings would result in what might be described as alternative reasonable maximum rates, either of which the Southern carriers, depending upon their policies or whims, might publish with total disregard of the rights or views of the Northern carriers. Requested finding No. 4 would further have the Commission find that the Scale 2 plus arbitrary basis, if the Southern carriers elect to publish it, would not result in undue prejudice to Southern shippers and undue preference of Northern shippers, but if published as the result of actions of the Northern carriers unlawfulness of this character would follow. To but so state the effect of the requested finding demonstrates its absurdity.

[fol. 863]

IV

Conclusion

In the last analysis, the sum result, if not the specific purpose, of the findings and order prayed for in the petitions would be to deprive these respondents of their inherent and lawful right and duty to insist upon the establishment and maintenance of the level of rates fixed by the Commission as just and reasonable under Section 1 of the Act with proper regard to the rate level prevailing within C. F. A. Territory, and to force them (the C. F. A. Roads) to become unwilling parties to a lower level of rates notwithstanding the effect thereof upon rates within C. F. A. Territory and the revenues which these respondents derive therefrom. Nowhere in this record has anyone seriously challenged the intrinsic reasonableness of the interterritorial rates prescribed in the original case, I. & S. Docket 3511, supra, and it is therefore difficult to understand the efforts of Southern interests to now persuade the Commission that its decision and order herein, which, for reasons not clear to these respondents, reduced the level previously found proper, should be now changed so as to require that the C. F. A. scale

as a practical matter be observed as the maximum for interterritorial rates. In this connection, the Commission should take notice of the fact that in many cases decided prior to and since this one, interterritorial rate levels have been prescribed which are much higher in relationship to the rates obtaining in the North than the basis prescribed herein on Coke at approximately 107.5 per cent of the C. F. A. scale. Attention is invited to the case Iron and Steel Articles be-[fol. 864] tween the North and South, supra, wherein by the decision of the entire Commission rates for interterritorial movements between the territories here involved were fixed at a level approximating 117.3 per cent of the rates applicable within Official Territory, also to the recent case Gager Lime Company v. Railroads, Docket 26829 (mimeographed), decided March 6, 1936, which fixed rates on lime from the South to the North on a level substantially higher than that obtaining within the North, thereby following the principle laid down in the instance of rates on the same commodity in Dann-Gerow Company v. A. C. L. R. R. Company, 210 I. C. C. 107. Other cases to the same effect are cited on page 10 of the reply to the prior petitions and are not therefore here repeated.

The Commission will perceive from the foregoing and from a comparison of the petitions that those now pending are identical in purpose with the prior petitions of the same interests and that they present no facts or arguments which could possibly support conclusions differing from those embodied in the order of February 3, 1936 issued following consideration of the said prior petitions. Because of these similarities between the pending petitions and those previously considered and disposed of by the Commission, these respondents in the foregoing have attempted only to point out briefly the basic errors and improprieties of the petitions and they rely upon their reply to the prior petitions of the same Southern interests for more detailed answers, as well as a complete explanation and justification of the position and actions of C. F. A. carriers, which petitioners would have the Commission condemn.

[fol. 865] These respondents therefore respectfully submit that the petitions should be forthwith denied.

Respectfully submitted, Roy S. Kern, Agent for above-named Respondents, 836 Wabash Building, Pittsburgh, Pa. A. P. Donadio, M. Carter Hall, Leo P. Day, Guernsey Orcutt, Of Counsel.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed to each party of record.

Dated at Pittsburgh, Pa., this 6th day of April, 1936.

Roy S. Kern.

[fol. 866] COLLOQUY AND ARGUMENTS OF COUNSEL

Judge Evans: What is that map?

Mr. Day: It occurred to me it might be helpful to the Court inasmuch as it shows the rate territorial divisions of the country.

If the Court please, this suit is brought under the Urgent Deficiencies Act of 1913 to set aside and vacate orders of the Interstate Commerce Commission relating to coke rates from points in the south, specifically from manufacturing points in Alabama, Tennessee, and Virginia to destinations north of the Ohio River generally in what is known as Central territory and I might explain that Central territory ordinarily comprises the lower peninsula of Michigan, the states of Indiana, and Ohio. It does extend over to some extent into western Pennsylvania and western New York, to the extent that it takes in Buffalo, New York, and Pittsburg- on the east and Wheeling, West Virginia on the west; and then on the western end where the movement is made from a point in Illinois or St. Louis, Missouri, or any Mississippi River point to a destination east of the Indiana-Illinois State line, or in the reverse direction, it is generally regarded as a movement in the Central territory or as it is also called Central Freight Association territory.

[fol. 867] Mr. Payne: Doesn't it include Illinois, Mr. Day?

Mr. Day: No, Mr. Payne. Illinois is a separate territory known as Illinois Freight Association territory. That is, where you are dealing with rates in Illinois, it is a separate territory and has a separate classification.

These proceedings started with litigation before the Interstate Commerce Commission in what is known as its Docket I. & S. 3511. Those proceedings involved, in the first place, a proposed revision of coke rates by the northern railroads in Central territory, within Central territory. Prior to that

case the rates on coke in this area were in pretty much of a chaotic condition. You would find one level of rates here, a lower level of rates there, and a higher level of rates somewhere else. The purpose of this revision proposed by the railroads in I. & S. Docket 3511 was to bring about uniformity, so that for an equal distance anywhere in the territory the rates would be the same.

The Commission heard with that case certain formal complaints. Some were filed by coke manufacturers in this territory such as at Indianapolis, Terre Haute, Ironton, Ohio, and other points, and in their complaint those shippers attacked the rate on coke then existing, holding that they [fol. 868] were unreasonable, in violation of Section 1 of the Interstate Commerce Act and unduly prejudicial of their plants, and other points under Section 3 of the Act that the existing rate adjustment favored the shippers of coke in the Alabama and the Tennessee district. At that time, even, as I say, the northern shippers were complaining of the level of the rate from the south into this northern territory. There was also a complaint filed by the Alabama shippers in which they attacked the rates from the south, from Alabama into northern territory and alleged that the rates were unreasonable and that they unduly preferred Chattanooga, Tennessee and preferred manufacturing points in the Central territory. Those cases were all heard on a consolidated record, and as a result the Commission handed down the decision which is offered here as our Exhibit 1.

Judge Evans: Who filed the original petition, the railroads?

Mr. Day: The way the proceeding was brought about in the first instance was that the railroads filed tariffs naming this new set of rates.

Judge Evans: That generally fixed transportation on the basis of mileage.

[fol. 869] Mr. Day: Yes, sir, but the shippers in our territory objected to the Commission to the rates that the railroads had proposed, and as a result the Commission exercised its power to suspend the rates and instituted this investigation.

Judge Evans: Then they made the order? Go ahead.

Mr. Day: They made the order in which they found the rates the railroads had proposed were too high and they reduced them to a mileage scale of rates. That is called and referred to as scale 2. That will be found at page 690

of the decision which is our Exhibit 1. At the same time, they prescribed from the south into Central territory what is known as scale 3 and appears on the same page of the report. That scale generally speaking, is about ten percent higher than the scale they had fixed for application within this northern area; that is, where the movement was from Detroit to Buffalo or St. Louis to Cleveland or Chicago to Indianapolis, and so forth, this scale 2 would apply; where the movement was from Chattanooga, Tennessee to Detroit, a scale 3 rate, which was higher, was intended to apply.

The Central territory lines, on receiving the decision, immediately put this scale into effect uniformly throughout their territory. And I might say, that when the Commission [fol. 870] decided the case, they said that the evidence as to undue preference and prejudice raised in these various complaints as to rates from the south was unsatisfactory, but that the establishment of these scale rates from the south and within Central territory would remove any violations of law that existed by reason of their being unduly prejudicial or preferential.

It was expected by the northern railroads that the southern lines would likewise revise their tariffs, the southern lines being the publishing agents for both sets of railroads, to the basis of this scale 3. But the southern lines, instead, simply reduced all rates that were higher than the scale and left other rates that were lower where they were. That necessarily again created a hodge-podge. We had lower rates to Detroit, perhaps, than to Cleveland for equal distance from a common southern point and we had violations of the long and short haul provision of the Act, in that one rate that the southern lines——

Judge Evans: Well, you had these difficulties. What happened? Let us get the story first and the history, and then come back to the cases.

Mr. Day: I should say that following 3511 the southern [fol. 871] interests petitioned the Commission on two occasions to rehear the case. They were dissatisfied with the level of the scale fixed, and they asked the Commission by petitions for rehearing on two occasions, to reopen the case but the Commission refused to do it.

When the C. F. A. lines were unable by correspondence or conferences to get the southern roads to bring all their rates to the level of scale 3 they adopted the only course that was left to them, and that was to revoke their concurrences in

the joint rates to the extent that any rate lower than the scale should be cancelled. The Commission's rules require that sixty days notice of such revocation be given and it will be appreciated that it took a long time to get the thing lined up. But finally the southern railroads did publish tariffs naming the scale rates for all of these rates that had been lower. But immediately those southern railroads and the southern manufacturers requested the Commission to suspend those tariffs.

The northern lines answered and pointed out that the rates were only the rates that the Commission itself had prescribed and that we had increased rates within our own territory in revising rates under the scale 2, and in some instances, the record points out, the advance was as much [fol. 872] as fifty-three cents per ton in our territory, although the Commission report points out that generally speaking the hauls of coke in this northern territory are for relatively short distances.

The Commission, however, suspended those rates and instituted an investigation in its docket I. & S., 3985. Hearing was had and the evidence offered before the Commission in that case is presented here. The Commission in due time handed down a report in which it said that the proposed rates had not been justified but that the railroads might put in another scale of rates which approximated 107 per cent of the Central territory rates instead of the 110 per cent previously prescribed.

Well, the same thing occurred as to that order as had happened in connection with the 3511 decision. The southern roads again took advantage of the opportunity to reduce rates and did, but they refused to bring the other rates up to the scale basis.

The basis of this lower scale was the northern railroads again had to go through the motions of revoking concurrences, and in due time the tariffs forming this 3985 basis was filed with the Commission. Again the southern inter- [fol. 873] ests, both carrier and shipper, requested the Commission to suspend the tariff and at the same time the Commission had before it these petitions for modification of its order in 3985 that are also offered as Exhibit 6; in which the southern lines asked the Commission to permit the northern lines to take that level of rates if it wanted to, but to deny to the northern lines any voice in what the rates should be.

A very short time, within a few weeks of those petitions, the Commission, without any ing, without the taking of any evidence, issue and order in its docket 3985 in which it forth the railroads to publish and maintain rates fr into Central territory no higher than the scale it had previously fixed for Central territory. time, on the same date, it made an order su new rates and instituting an investigation i I. & S. 4198. The northern railroads attemp an injunction against the Commission's orc cases, but on account of the vacation season t able to bring the matter to the court's att today, and so they were compelled by reason [fol. 874] penalties which the law prescribes to comply with decisions and orders of the C permit the establishment of rates from the sou territory on this scale 2 basis.

Now, I might say that while it would appe rates from the south are on the same basis as erally in the north, the fact is that the sout some cases are lower. The Commission in Doc mitted the northern railroads to charge highe northern part of the southern peninsula of what is known as zone C territory because density of traffic up there, no such provision respect of the southern rates so that the s without anything added for that territory in part of southern Michigan is provided for. has asked me to state that the investigation Docket 4198, this new case, was by order of sion terminated on September 29, of this yea mission said that as the rates had been put August 13th, there was no longer any need for tion and they just discontinued the proceeding [fol. 875] Now, as I stated a while ago, one made by the plaintiffs here is that there is n evidence to support the Commission's decisio in these cases.

Judge Evans: Let me ask you, that is w called practical questions rather than legal? by the local coke producers as against the A producers, and in turn the railroads serving producers. Is that the way it works out?

Mr. Day: That is true, yes, sir. The record properly certified has been offered in evidence here. Now, it is well settled——

Judge Evans: Would that, generally speaking, produce less revenue to the railroads of the Central group here?

Mr. Day: Yes, indeed, to the extent that movements within Central territory are displaced by southern coke paying this abnormally low level of rates, the northern lines sustain losses in revenue.

Judge Evans: Might it not be that it would go to some other place?

Mr. Day: You mean by making higher rates on other commodities?

Judge Evans: Now, you have rates on coke, and Alabama [fol. 876] coke goes into territory which, say, the St. Louis coke formerly occupied, the St. Louis coke finds its way somewhere else.

Mr. Day: I do not think so. The record in these cases show there is considerable over production of coke in the Central territory, that our manufacturers here are unable to find markets for their products.

Judge Evans: Well, would there be any traffic for the southern railroads, for Alabama coke to be brought up here if the other rates were charged?

Mr. Day: Yes, your Honor.

Judge Evans: Is it a controversy, in other words, between two sets of railroads?

Mr. Day: It is a controversy between two sets of railroads, because the southern lines are favoring their shippers.

Judge Evans: They claim they are benefiting by this traffic?

Mr. Day: Yes.

Judge Evans: Not because of the rate, but because by this rate they then put the manufacturers of Alabama coke in a position to get their coke out, is that it? In other words, otherwise, they would not be able to send it out?

[fol. 877] Mr. Day: That is the contention made by the southern people.

Judge Evans: The other side saying that the northern coke cannot find a market if the Alabama coke comes up, and thereby they won't have any business, is that it?

Mr. Day: That is the contention here, that the southern people say they have got to get in on our basis of rates in order to do business here.

Judge Evans: And the northern producers, say if they do get in on them they cannot do business.

Mr. Day: That is right. The northern man pays the maximum reasonable basis of rates, and he says that the southern man should do likewise.

Judge Evans: That is your argument, but the contention is if the northern man gets the coke market, it to that extent excludes the southern producer and thereby lessens the southern railroad's business.

Mr. Day: We do not agree with that. I would like to call your attention——

Judge Evans: If the freight rate makes a difference on business, it must be that way.

Mr. Day: Well, it would, if you take into account only the freight rate and disregard all other considerations. Now [fol. 878] the fact is shown in this record that the northern man, for instance, cannot even sell his coke at the Ohio River. He is shut out of such big consuming points as Cincinnati, Louisville, and Evansville. That is the market of the southern people.

Judge Evans: He sells it, but he has to sell it at the same price the other fellow sells it at.

Mr. Day: He doesn't even sell it. He cannot. He has just surrendered those markets to the south.

Judge Evans: Because of a difference in the quality of the product?

Mr. Day: Let me read this brief sentence or two from the Commission's decision, Docket 3511, page 671:

"It is noteworthy in connection with the question of undue prejudice to observe that the disadvantages under which the Central territory producers labor in meeting competition from Birmingham and Chattanooga, are due in some measure to their higher cost of production." Birmingham producers sell coke in the Central territory at $3.20 to $3.50 per ton f. o. b. origin which prices are even below the cost of production in Terre Haute or Indianapolis ranging from six to seven dollars per ton. Now, the Commission says as to that:

"This disadvantage as to production cost cannot be cor-
[fol. 879] rected by us."

Judge Evans: They have the code.

Mr. Day: I should think so. As a matter of fact, the record does refer to the effect of the code. They said while the code was in existence, the northern lines were in a better position to sell the coke in competition with the south.

Judge Evans: I was trying to get the issues. I do not mean to be facetious. I was trying to find out if this is not an economic question as to who is entitled to cheap coke, or whether the railroad rate questions do affect where these people in this section shall get their coke.

Mr. Day: One trouble we find at the point we make with respect to the Commission's order is that they disregarded transportation conditions; and the facts that should control it in fixing rates from the south and attempting merely to fix the level of rates that would give the southern shippers a competitive basis that they thought they ought to have, not because of any transportation conditions, but because they said their competitor had that rate.

Judge Evans: Aren't rates ever made on that basis?

Mr. Day: On the basis of——

[fol. 880] Judge Evans: That you cannot get a haul there unless you haul it at a certain rate.

Mr. Day: In the course of my argument, I was going to refer to several cases. For instance, one involving the case in which the Commission fixed the rate on lemons in this country, and in doing so they referred to the fact that they prescribed the basis they did because our American lemon growers and shippers were having such difficulty in competing with lemons being imported into this country, but the courts held that was not a consideration that the Commission had a right to take into account.

Judge Evans: What court?

Mr. Day: Federal Court, 190 Federal.

Judge Evans: I wanted to know if it was the Supreme Court.

Mr. Day: No.

Judge Evans: Whether any Supreme Court's decision did state the Commission cannot take that into consideration.

Mr. Day: Yes. I have a case. There are several cases, as a matter of fact, but I also was going to refer to the case

of Southern Pacific Company against the United States, 219 [fol. 881] U. S. I have a note of it here. The language I would refer to particularly appears on page 449 of the opinion. In this case, I might say, that the Commission refused to permit an advance in rates on lumber from the Willamette Valley in Oregon, because it said to establish that higher basis of rates would render it impossible for the Willamette Valley shippers to compete with the California producers, and the Supreme Court in setting aside the order of the Commission said briefly that it was not a circumstance that the Commission had a right to consider. It did not involve transportation and it was not up to the Commission to try to better the status of a particular shipper. Now, the same thing is stated in the recent decision 289 U. S. 637, Texas and Pacific Railroad Company against the United States and is known as the Port differential case. This is what Mr. Justice Roberts said in that case:

"While the carriers may therefore meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with a motive of aiding or injuring a shipper. That so to do is to depart from the transportation standards, conformity to which the Act contemplates and substitute others which are [fol. 882] prohibited." That is what we say the Commission did in that case. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful, and obviously, what a carrier may not lawfully do, the Commission may not compel. The Court cites a number of its own decisions in that connection.

The question of the sufficiency of evidence is not a question of fact, but a question of law.

Judge Evans: The real question here is whether the rate that was fixed was reasonable, not in the light of whether it affected St. Louis or any local business for coke, but whether in itself it was a reasonable rate.

Mr. Day: No, your Honor, I do not think that is the question. The question is whether the Commission acted arbitrarily, whether it exceeded the powers lawfully delegated to it by Congress. Whether there is substantial evidence here to support its order.

Judge Evans: That last question is what I put, whether there is evidence to support that order as being a reasonable

rate or not, that is to say, unreasonable, and whether they had jurisdiction of the case.

[fol. 883] Mr. Day: They undoubtedly had jurisdiction.

Judge Evans: They would not consider whether it affected St. Louis coke or Chicago coke. It was merely a question of whether the rates charged for hauling coke from the south was reasonable.

Mr. Day: That is the difficulty here. The Commission, while they said in this last decision that the rates would be unreasonable to the extent that they exceeded the lower basis prevailing in our territory, at the same time it clearly appears from all of the decisions and from the record in this case just what the Commission did, and we say what they did was arbitrarily to attempt to help the southern shippers by ignoring transportation conditions, by ignoring the evidence, and simply and arbitrarily fixing this basis and compelling the northern lines to accept it.

Judge Evans: I thought you said these cases said they could not consider the question of how it affected other localities. The question would be a transportation question, namely, was this rate a legal one.

Mr. Day: That is why we say this order is unlawful, because the Commission did that very thing.

Judge Evans: I do not see where St. Louis would have [fol. 884] anything to question, if the rate was reasonable. It may take away their business and all the local business.

Mr. Day: But our contention is the rate is not reasonable.

Judge Evans: That is what I asked you, if that is not the only question.

Mr. Day: No, that is not the only question. We have a number of questions. We say the Commission acted arbitrarily. They attempt to equalize geographical disadvantages and fortunes and opportunit-es contrary to what the Supreme Court has repeatedly said they cannot do. We say they denied us a fair hearing. We say they acted without any evidence in support of what they have done through their findings or their order.

Judge Evans: It does not look as if there was any unfair hearing. They gave a long enough time to get in the evidence, if you had any. It was two years, wasn't it?

Mr. Day: They made the last decision without any evidence.

Judge Evans: That was merely a sort of enforcement of the order they previously reached. They had the evidence

in and that is all there was to it, to draw a conclusion from. [fol. 885] Mr. Day: They had a petition from the southern shippers asking them to let the southern lines have the higher rates if the southern lines wanted them, but not to let us have any voice in it, and when we pointed out to the Commission they could not lawfully do that, they attempted to get around that legal obstacle by making this arbitrary order forcing us to join in the Central territory basis of rates from the south. The Supreme Court repeatedly held that an order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. Now, they have said that——

Judge Evans: There would not be any question about that. You may except that.

Mr. Day: We submit that an examination of the record will amply sustain our position in this regard. Not only is there no evidence that the rates were unreasonable, but the record is replete with admissions by the experts who testified for our opponents to the effect that even the 3511 rates which is all we are asking for here are less than reasonable maximum rates. They concede that, but they say we have got to have the lower basis that you have in your territory in order to let our shippers compete in Central territory. [fol. 886] Judge Evans: Let me ask, do you concede that? He made a statement of what you conceded, that they were unreasonably low.

Mr. Payne: No, oh no, absolutely not.

Mr. Day: May I read some of the testimony in that respect, then?

Judge Evans: Well, testimony is one thing and a statement of concession is another. I thought the concession was by your adversary. Concessions are made by adversaries and not by third parties.

Mr. Day: This appears at page——

Judge Evans: Who was the man talking?

Mr. Day: Mr. Baring of the Southern Railway.

Judge Evans: And what is his position?

Mr. Day: He had the position of commerce agent of the Southern Railway and was the only witness for the Southern.

Judge Evans: I may suggest, Mr. Day, merely in your argument this morning, your position is the evidence does not support the finding or statement that the rate is unreasonable, but on the other hand disproves it. Your brief,

no doubt, will refer specifically to the particular bits of evidence to support that.

Mr. Day: Yes, we can do that.

[fol. 887] Judge Evans: What we would like to get is a general outline of the positions in your statement, and so far as possible, eliminate everything that your opponent can agree on by argument. That is why I asked counsel if he conceded that fact. If he did, it would be important.

Mr. Day: With the Court's permission, we will file a brief and set it out in detail.

Judge Evans: Giving specific reference, because if this is going to turn on whether there is no evidence in the record to support it, we must have from the other side the evidence that does support it. In other words, we cannot go over all that record of two years testimony ourselves. You say there is no evidence to support it and he says there is. It is up to him to point it out and you can explain it in your reply brief, why it does not support it.

Mr. Day: We have presented a certified transcript of the oral argument before the Commission to show that no one before the Commission raised any question of the unreasonableness of the 3511 rates. If these people had any such idea or contention in mind, obviously they would have stated it before the Commission where they were given quite a lot of time to argue.

[fol. 888] Judge Evans: Let me ask you, that rate is ten per cent higher than the one they ultimately put in force.

Mr. Day: Yes, your Honor.

Judge Evans: In other words, the next rate was a reduction of ten per cent?

Mr. Day: No, the next step was 107 per cent of the rate they ultimately put in and then the third step was 100 per cent rate of the northern basis. That is, equal to the northern basis, generally speaking. I would like to call attention in that connection briefly to the statement that Mr. Commissioner Meyers, one of the four Commissioners who dissented from this action of the majority in prescribing the C. F. A. rates from the south. Mr. Meyers, as the Court may know, is the nestor of the Commission. He has been a member since 1909 and is entirely familiar with these interterritorial rate adjustments and rates generally throughout the country.

Mr. Meyers says:

"The basis of rates now established herein as reasonable is the third successively lower basis of rates prescribed in this proceeding within the past three years. As I under- [fol. 889] stand the case, the sole purpose of now requiring a further reduction is to enable southern producers and carriers to better compete with the producers and carriers in the north in the sale and promotion of coke to destinations in the north. While the rates now prescribed are termed maximum reasonable rates as were those twice previously prescribed, they are in fact subnormal competitive rates. Instead of testing the rates by the standards ordinarily employed, they were here tested solely by the level of rates applicable within the north and the expressed desires of the southern producers and carriers for the same level of rates from the south to the north for competitive reasons. The logic of the report is that if the northern carriers should later voluntarily reduce the level of their rates within the north, such reduced levels would then be prescribed as the maximum reasonable basis from the south to the north if the southern producers and carriers so desired.

The right of carriers to voluntarily reduce their rates to meet competition is recognized. The southern lines are free to exercise this right by reducing their rates to the border of the two territories. I do not recognize the right [fol. 890] in this Commission to require the northern lines to join in less than maximum reasonable rates for the sole purpose of enabling southern lines to better meet northern competition. I am authorized to state that Chairman Mahaffie and Commissioner Porter and Miller join in this dissent."

So we say because the authority exercised by the Commission in this case has been exercised in such an unreasonable manner in which the Commission exercised it, that the order must be declared invalid.

Because of the Court's wish to receive, as I understand it, the details of the case briefed, I will refrain from discussion of the Commission's findings in these several reports with respect to transportation conditions.

Judge Barnes: Pardon me, tell me what those last words on page 87 mean. "They are based solely by the level of

the rates applicable within the north." Tell me that so someone that does not know anything about rates can understand it.

Mr. Day: That means in the Central territory, that is, the states of Ohio, Michigan, and Indiana, the Commission had fixed this scale 2 rate, scale 2 basis of rates which we will call 100 per cent. Now, they had fixed 110 per cent from [fol. 891] the south into our territory.

Judge Barnes: Well, why?

Mr. Day: Because of the more unfavorable transportation conditions in the south. There is a considerable less density of traffic, that is, tonnage on those southern lines, and they cannot perform transportation as cheaply, therefore, as the railroads in the north where traffic density is, generally speaking, very heavy.

Judge Barnes: Yes.

Mr. Day: Now, what this means is that instead of testing the rates by the standards ordinarily employed, and I might say in that connection, standards ordinarily employed are comparison of rates on the same or similar commodities in the same general territory, and where the transportation is performed under similar circumstances and conditions. Now, if the southern people really had a complaint here, if they had a clause of unreasonableness, what they would do is show that on coke from Birmingham to some other point, to where the transportation is similar to C. F. A. territory, the rates are so much, and those rates were perhaps approved by the Commission and they are lower than [fol. 892] the rates which we are charging therefor. That is evidence that the rates that they are asserting are unreasonable. They could say on iron and steel, for instance, or any commodity they might set up comparable in its transportation characteristics with coke, if they could show the rates there from Birmingham or Chattanooga to Central territory were low, and the earnings we get per car or per car mile, or per ton mile were lower, that would be evidence of the unreasonableness of the rates we charged on coke. But there is an entire absence of any such evidence. The only evidence as Mr. Commissioner Meyers points out, the only basis for the Commission's decision is that this set of rates exist in the north and the Commission picks it out of the air and says that should be the basis to apply from the south.

Judge Barnes: You speak of 100 per cent in Central Freight Association territory and 110 per cent in southern territory.

Mr. Day: From the south to C. F. A., yes.

Judge Barnes: What is the rate in southern territory?

Mr. Day: The rates on coke in southern territory are very low. They are lower than our rates, I think.

Judge Barnes: They are lower than your rates?

[fol. 893] Mr. Day: Yes, but they are voluntary rates made by southern railroads to assist their shippers. The northern lines are not in any wise parties to those rates or have any control or have anything to do with them, and as Mr. Commissioner Meyers points out, they are free to do that. The right of carriers to voluntarily reduce their rates to meet competition, in other words, they can go to the border of their territory with lower rates and we have no complaint. But we have to complain when they try to force on us an unduly low level of rates.

Judge Barnes: Where does 110 per cent come in? Who said 110 per cent is proper?

Mr. Day: The Interstate Commerce Commission said 110 per cent in I. & S. Docket 3511. When we were before the Commission we asked them to fix a much higher basis. We said they should either permit the railroads to maintain combination rates, that is, the L. & N. from Birmingham up to Evansville and the Big Four, we will say, from Evansville to Grand Rapids, Michigan, each charging its own rate, or in lieu of that to fix a joint basis of rates approximately 120 per cent of what the rates were in our own territory, and we have abundant precedent for that. We [fol. 894] cited to the Commission many cases in which they had thoroughly aired the subject of what the level of interterritorial rates should be. One of them is a case involving rates on stoves from the south, where the southern people were contending for our level of rates but the Commission fixed the basis of 133 per cent of our basis to apply from the south into our territory and that has been the general rule all the way through.

The Commission recognized these differences in transportation conditions and has always made the rates from the south into our territory higher. I referred a while ago to the question of divisions, and if I might briefly, I would like to say a few words about that. The Commission assumed,

when they were giving us on this inter-territorial traffic, generally speaking, the same rates that we had in our own territory that we had no reason to complain, that our compensation would be the same in any event. But that, as we attempt to point out, assumes that the southern lines are going to allow us just as much on this business as we would get within our own territory, and there is no basis for such an assumption. There is nothing in the record on it, and this letter from the southern lines that we have offered in [fol. 895] evidence positively negatives that idea.

The Court, perhaps, is familiar with the recent decision of the Supreme Court with reference to divisions between northern and southern lines. That is a case decided May 18th this year. It is not reported as far as I know. I think the number was 312, Baltimore & Ohio Railroad against the United States. The northern lines attempted to set aside a divisions order of the Commission there, in which the Commission was allowing the southern roads, according to the Supreme Court's decision, eighty-five per cent more revenue than they gave the northern lines, mile for mile. In other words, if they gave us one cent in our territory per mile, they gave the southern lines $1.85 and we are confronted with like demand from the southern railroad and perhaps faced with an order from the Commission in the event that divisions cases are subsequently filed fixing our divisions on some such basis.

Judge Evans: Couldn't they, on the other hand, in view of the fact that what Commissioner Meyers says, couldn't they reduce that rate as much as they want to? Couldn't they, in the divisions, give them considerably less?

[fol. 896] Mr. Day: They could, but when we have these division cases, the exigencies of shippers are forgotten and it becomes a case of dog eats dog with the railroads.

Judge Evans: If that situation does arise and you get that adverse ruling, come up then. It may be you have no complaint.

Mr. Day: We have a complaint aside from that and merely point out that the record contains no evidence to warrant this order that the Commission made.

Aside from that, it is entirely fallacious to say we get the same revenue from that traffic as we do from our own territory. The Court is familiar with the railroads in this part of the country. It is hardly possible to conceive of a movement of coke in this territory that cannot be performed by a

single railroad. If you want to reach a given out of St. Louis, if you want to reach a destin Chicago or Indianapolis, there is scarcely an cannot be performed by one railroad, and for t railroad would get all of the earnings. In the southern movement, at least two lines are req cannot make a movement with any less than t [fol. 897] frequently there are three or four or So that it is entirely improper and erroneous to Central territory lines would get just as great of this traffic as they do out of a movement with territory.

I think I have discussed sufficiently our poi error of the Commission in attempting to e graphical disadvantages, fortunes, and opport

Judge Barnes: Tell me just why, if rates in territory are less than 100 per cent and rates of Freight Association are 100 per cent and you division of the joint rate——

Mr. Day: We cannot get a proper division cent, and even if we could we would be maint that are less than reasonable maximum rates.

Judge Barnes: Well, suppose you took co Evansville and carried it to Chicago. Suppos car of coke at Evansville and carried it to Chicag get 100 per cent, wouldn't you?

Mr. Day: Yes, your Honor.

Judge Barnes: Why should you get more comes across the river?

Mr. Day: We would not get anywhere near as [fol. 898] Judge Barnes: I say, if you got a pro of the joint rate, that would be 100 per cent.

Mr. Day: Even if the southern lines were so as to say you could have as much as we get m we would not get as much. I figured a case of moving six hundred miles from the south to the for that, under the rate we are contending f would be, as I remember it, $4.55. Under the ra mission has forced on us, we are compelled to c Now, assuming that the haul is 300 miles on each Ohio River, and assuming that the southern line we are going to give you just as much as we get,' mean that we would only get $2.07½ from E Chicago, and the L. & N. would take the other $2

if we hauled the traffic ourselves from Evansville to Chicago we would get $2.85.

Judge Barnes: If you are going to get 100 per cent, and you had a three hundred mile haul on each side of the River, you would get half of that. You would have the same in one case as you would in the other.

Mr. Day: No.

Judge Barnes: Why not?

Mr. Day: We would, if you are assuming a movement in [fol. 899] our own territory of six hundred miles.

Judge Barnes: It is just the same on one side of the line as the other, you would get 100 per cent.

Mr. Day: You would have to assume a case from St. Louis, Buffalo, New York. We will say that is a six hundred mile haul. The New York Central, instead of hauling it all the way, gave it to the Pennsylvania or some other railroad after hauling it three hundred miles. That would not be in accord with the facts, but if you assumed that kind of a case, then, yes. The answer would be the New York Central would get just as much for three hundred miles as it would with this arrangement with the southern lines, but the point is that as long as we are charging maximum reasonable rates in our own territory that the southern shipper ought to pay exactly the same kind of rates. In other words, he, too, should pay what the Commission has set to be maximum reasonable rates. That is the gist of our complaint.

Now, it is possible for us to adjust rates, to adjust these rates so as to place our shippers in the same kind of position. Mr. Meyers points out here if we do that we would be in danger of having the southern rates later reduced. But we [fol. 900] could treat our shippers as liberally as the southern roads do by saying the southern lines are giving the shippers rates eighty-five per cent of normal. We will do just as well for St. Louis or Indianapolis or Chicago or Terre Haute, or Detroit, or any other point where they make coke around here, we will make a basis of eighty-five per cent of this scale. Then where would we be? You would have 3511 conditions reestablished, but with the resulting loss and a serious loss in revenue to these northern railroads. Now, they felt they could not afford to do that, and yet, that is the only alternative they are given in this case under the decision of the Commission. If they want to put their shippers on equality with the southern shippers, then they have got to submit to radical reductions in their rates.

I think that concludes the main points that the carriers have urged here and we submit that they warrant a decree by the court that the Commission's orders in these cases are unlawful and void, exceed the Commission's authority and therefore should be vacated and set aside.

Mr. Cronk: If your Honors please: I represent intervenors in this case who are producers and shippers of coke [fol. 901] with plants north of the River. As I see the situation here, the Commission, in Docket 3511, prescribed for hauls within the north, that is, north of the Ohio River and a maximum reasonable basis of rates. They also prescribed what they called a maximum reasonable basis of rates from the south to the north which were, as Mr. Day said, ten per cent higher. Now, the shippers in the north, of course, could not ask, and the Commission could not require the railroads north of the River to haul coke for less than the maximum reasonable rates, because they have no power to do so unless some unusual situation existed to remove undue prejudice, but that does not exist here.

Now, what they did then was, having prescribed maximum reasonable rates between points in the north, which the north coke producers had to pay to get their coke to market; then from the south, on account of the highly competitive condition, and the record is replete with evidence that it is a highly competitive situation as between coke producers, south versus north; they said, "We will fix maximum reasonable rates from the south to the north to get into a common market," and did so. That was in Docket 3511. Then the [fol. 902] controversy arose as to the publication of those rates and the southern lines, not wanting to yield to the increase of their rates to that basis, it resulted in a subsequent proceeding under a new case, a new docket number, involving a number of rates, and then in that proceeding the final result was that the Commission finally wound up by prescribing the same basis of rates mile for mile from the south to the north as they prescribed within the north.

Now, when that case arose, all the testimony that I can find in the record indicates that the carriers themselves thought that the rate which the Commission prescribed were maximum reasonable rates, and so stated. However, they said, "We want less than maximum reasonable rates." Why? "Because our producers of coke in the south can then ship coke to the north if the rate is low enough, and we want the rate low enough regardless of the maximum

reasonable rate. We want the rate low enough, far enough under the maximum reasonable rate to permit this tonnage to move." And that is what the Commission finally prescribed.

I could read to you the verbatim statement of four or five witnesses in that case who stated, as I have suggested, but [fol. 903] it is clearly demonstrated by the questions and answers——

Judge Evans: What is really meant by maximum reasonable rates?

Mr. Cronk: Well, the maximum reasonable rate is the rate that the Commission decides is the maximum reasonable rate from all the evidence.

Judge Evans: Maximum, that is the highest.

Mr. Cronk: That is the highest they can get. Anything beyond that would be unreasonable, and therefore in violation of law.

Judge Evans: But they can go below that?

Mr. Cronk: Well, the Commission——

Judge Evans: When you get down to showing instead of the maximum reasonable rates, you get to the——

Mr. Cronk: Minimum.

Judge Evans: Isn't that what you call the southern rate?

Mr. Cronk: Yes, I think that is about the situation. I think that is about how you could designate it, to show that that is what they did to it. It is the minimum reasonable rate. I want to read briefly some questions and answers of Mr. Baring. He was commerce agent of the southern rail- [fol. 904] road that was sent down there to obtain for his line what they were asking. They had published a high rate, and they asked the Commission to suspend it and Mr. Baring came down to prove to the Commission the thing they did was not what they should be required to do.

"Q. Mr. Baring, do you consider that the proposed rates would be reasonable, or would be reasonable per se?"

"A. Well, I do not think they would be unreasonable per se, but I think they would be too high to allow any business to move with relation to short haul and long haul."

He said it would not be too high, but they would not let any tonnage move.

"Q. That is to say, judged alone by transportation conditions, you would not regard them as unreasonable per se?"

"A. No, I would not regard them as unreasonable per se."

"Q. Would the Commission be correct in concluding from that that your proposal to establish the C. F. A. scale from the south contemplates rates somewhat less than maximum reasonable rates, transportation conditions considered."

[fol. 905] He said no, but I think his answer following perhaps is yes.

"A. No. I think transportation conditions considered, it would probably be a little less than maximum reasonable rates."

That is, he is talking about the rates he wants to put in.

"I would not say that the interterritorial scale as prescribed is unreasonable, that is, the ten percent higher scale is unreasonable, because I believe in higher rates myself, but it does not move the business. You might as well not have the rates."

"Q. In other words, your position is that no rates higher than the C. F. A. scale from southern producing points to the destinations in Central territory are necessary to move the traffic?"

"A. Yes, sir."

Now, that was the tenor of the line of testimony. They all came forward and said, "No, we are not going to say these ten percent higher rates that the Commission prescribed are beyond the reasonable basis, but what we want is something [fol. 906] lower than the maximum reasonable basis." As your Honor says, the minimum reasonable basis, "In order that our shippers can move into the northern market." That brings me back to the legal aspect of that situation. The carriers in the north are entitled to establish maximum reasonable rates which they have done under the order of the Commission, 3511. No shipper can require them to go below that basis. The Commission says to the competitor, "We cannot bother that rate because we decided that is the maximum reasonable rate, but for the competitor in another territory, you will have to give him the minimum reasonable rate."

I say that is unjust discrimination and prejudice which makes the order itself illegal because you cannot give one shipper—I am talking about where there is competition—

you cannot apply one yardstick to one shipper and another yardstick to another.

The Commission has said, and perhaps Courts have said, "There is some elasticity in a reasonable rate". It may vary in a zone, but if you go to the top for one shipper in the zone, you must go to the top for the other shipper. That is the reason why in my opinion this order is illegal. It does that thing.

Judge Evans: If there were strictly parallel situations [fol. 907] where a shipment was, say, from St. Louis to Detroit, we have got to have a situation coming from the west, and a fellow further west came up there, you would have a clear case of comparison. But there is no real basis of comparison about this northern rate with the southern rate.

Mr. Cronk: The hauls are longer.

Judge Evans: They start on a different route.

Mr. Cronk: The hauls are longer, too.

Judge Evans: We had a case here one time which involved a question of alfalfa and touching a situation where they could not haul the alfalfa from Colorado and western Nebraska to this section because the freight rate was so exhorbitant, so high. They tried to get through a very much reduced rate, but when they struck the state line, then the state was hauling alfalfa locally for a much higher rate. You mean to say they could not put that lower rate through from Colorado and make the railroad carry that as a part of the through haul for less than what they charged local people for a local haul?

Mr. Cronk: I think that is probably right. They could not be compelled to do it.

Judge Evans: It is comparable to this, except the situa- [fol. 908] tion is different. There was no possibility of shipping the alfalfa at all, unless they got the lower rate, lower than what they were charging. Now, in this business, in a sense, you are saying that Alabama fellows should be denied this market.

Mr. Cronk: No; I am not saying that they should be required to pay on their coke the same——

Judge Evans: They cannot do it, he says, and compete, or the other one, the northerner cannot do it.

Mr. Cronk: They say they cannot do it and compete. That is just the point. If they have to have a low rate to compete, lower than a reasonable rate, they are just out of the market.

We are out of their market. We could not ship coke down south and sell in competition with them.

Judge Evans: There is no question of fact. That is not the point. If they can make it cheaper and then they sell it up here, but they have got to have a reduced freight rate in order to do it. Now, your colleague simply said if that rate was in force, then the northerners could not compete with him. I say he could if he reduced his price, but that would compel him — reduce his price to the level of the other fellow.

Mr. Cronk: If he had the maximum reasonable rates the [fol. 909] the same as we had in the north and he could sell a million tons of coke, we could not complain about it because we know as far as his freight rates are concerned, he is paying the same basis we are.

Judge Barnes: How do you answer this conclusion of the majority of the Commission: "Is interterritorial rates higher than column 2 rates were warranted, as the Central carriers contend because of conditions in the south, it would be probable that the increment accrued slightly to the southern carriers." How do you answer that?

Mr. Cronk: Of course, I represent shippers. If it accrues to the southern carriers it is all right as far as I am concerned. What the northern producer is interested in is the rate. Of course, I may be in a different position than Mr. Day who represents carriers. I cannot say that the shipper is interested in how the rate divides, but he is interested in what his competitor pays. It may be true that the increment should fall to the southern carrier because of the higher rates of transporting freight in the south.

The Commission said in one case which illustrates my viewpoint in Stoves, Ranges, & Boilers, 182 I. C. C., that [fol. 910] is where rates in the south were trying to be reduced to let the southern fellow get into the northern market. The position of the southern interests is in effect we should require the northern carriers to join with the southern carriers in joint rates from the south to the north sufficiently low to enable southern manufacturers to obtain an amount of trade in the north satisfactory to them. "With this contention we cannot agree. It is not within our power to equalize natural disadvantages of location."

Now, they happen to be six hundred miles from the market and they want to get in at a low rate and we say if that rate is lower than the maximum reasonable rate which is the basis of the rates we pay, they cannot do it. It is illegal for the Commission to so prescribe rates to enable them to do it. That is the position of the intervenors in the case from the north.

Judge Evans: Any other intervenors?

Mr. Radosta: If the Court please, I believe——

Judge Evans: Who do you represent?

Mr. Radosta: My argument is on behalf of the coke producers at Chicago, St. Louis, Milwaukee and Waukegan, Illinois; and the Interlake Iron Corporation has a few other [fol. 911] plants at Erie, Pennsylvania, Duluth, Minnesota, and one at Toledo.

Now, the discussion here has covered the points as to the statement that the southern carriers in this case made no contention that the rates that the carriers had published and which the Commission had suspended and in its final decision here refused to permit to become effective were in excess of reasonable maximum rates. There is no evidence in this case to show they are in excess of reasonable maximum rates. All the southern carriers showed or attempted to show was that the rates which were proposed were rates which were not below minimum reasonable rates. In other words, they said, "We are not committing ourselves as to whether these rates are in the excess of maximum reasonable rates, but our shippers say that in order to go into northern territory, we must have a basis of rates lower than anything that the Commission has heretofore prescribed in these general investigations."

Now, the point that has not been adequately covered, I believe, is the justification for the ten per cent higher rate interterritorially from the south. The southern producers to the northern destination. The basis which the Commis- [fol. 912] sion prescribed in the general investigation, which was on a record, I would say, approximately ten times as large as that before the Court here, the Commission there went into the question of difference in transportation conditions in the north and the south, and they found there as they had in other cases, that the traffic density in the south was much less, the operation conditions there were less

favorable, and therefore the rates from the south, in order to be on a proper basis, in this case, the Commission was fixing only maximum rates—that is, they were telling the carriers the maximum amount that they could charge under the law, and they said in this connection with respect to the transportation conditions at page 677 of their report, 194 I. C. C. 640, "We have recognized in numerous cases that from a rate making standpoint southern territory is rated higher than central territory. The evidence of record indicates that the traffic density in the former is substantially less than in the latter; where we have prescribed interterritorial rates which did not reflect this difference, special circumstances surrounding the traffic accounted for the exception."

Now, the Commission, in answer to the argument of the southern producers with respect to the question of the [fol. 913] propriety of picking out certain heavy density roads in the south as taking their traffic density and comparing it with roads in the north, the Court said, "It is true that the traffic density on the Louisville and Nashville compares favorably with that on lines in the central territory, but in fixing interterritorial rates due consideration must be given to the adjustment as a whole, else by piece meal revision the whole structure will be undermined."

In other words, if you just pick out the best points in the southern picture and fix your level in the entire territory on conditions found in those few roads, you will not, you cannot fix a proper basis for the entire territory.

Now, that fact and statement has been generally recognized by the Commission and we subscribed to it. However, in this recent report, this last report in this case, the Commission after the petitions of the southern producers and carriers, and in which there was no further hearing on that question, the Commission finally succumbed to the efforts of the southern producers, disregarded its holdings in other cases, its long established precedents and practices, and succumbed to the argument and fixed the rates [fol. 914] the same as those in central territory supposedly because of the traffic density on a few lines of railroad which have the heaviest traffic density in the south. They said, "The above pronouncement is sound as a general proposition"—referring to their first statement which I read before—"but we do not believe it should be applied

here. Coke is shipped to the central territory only from a few southern origins and moves over the main arteries on which traffic is much heavier than the traffic in the south as a whole. The entire adjustment to the extent that it is of interest to the manufacturers and shippers of coke in the southern territories is before us and no contention for column 3 rates are necessary to preserve carriers' revenues. On the contrary, southern carriers are convinced the column 3 rates would restrict, if not prevent, the movement of coke from southern territory." We contend that the action of the Commission in ignoring transportation conditions in the south as a whole is arbitrary action. It does not justify the action taken and departs from all precedent and gives the south a basis which is not the maximum reasonable basis such as that which the producers in the north must pay, but a much lower basis.

[fol. 915] Now, the Commission in its original case stated the correct proposition. Rather, that is in the second case in this proceeding. It had stated that traffic density affects the costs of operation.

Judge Evans: I do not think there is going to be very much dispute about that issue. I cannot conceive of it.

Mr. Radosta: Very well.

Judge Evans: There must be a basis for rates.

Mr. Radosta: Well, yes. Insofar——

Judge Evans: That cannot be the only factor, however.

Mr. Radosta: No, but it is one of the factors that was not covered in this case by the formal argument. Now, insofar as the northern producers in shipping to the south are concerned, taking in the fertilizer case, these very same producers shipping sulphate of ammonia to the south. They have recognized the conditions in the south, and on the movement of traffic from north to south have added to our basis an additional rate which increases the total amount of the rate on the shipment. Now, in meeting competition in the reverse direction, the Commission ignored that differential and treatment like that is not justified by the record.

[fol. 916] Judge Evans: We will resume at two o'clock this afternoon.

Thereupon an adjournment was taken to two o'clock, P. M., of the same day.

[fol. 917] Equity No. 15266

BALTIMORE & OHIO RAILWAY COMPANY et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA et al., Defendants

Parties met pursuant to adjournment on October 15, A. D. 1936, at the hour of two o'clock, P. M. before the Honorable Evan A. Evans, John P. Barnes, and Charles E. Woodward, Judges of said Court, and the following proceedings were had, to wit:

Present: Same as Before.

[fol. 918] Mr. Norman: If the Court please, I appear for southern shipping interests that were in the proceedings before the Interstate Commerce Commission from the beginning, in fact, filed the original complaint out of which ultimately grew this entire proceeding. As it is imperative that I be in Washington in the morning, I must catch an early train, counsel for the Commission and for the Government have agreed that I might go forward.

Now, if the Court please, it seems to me that this case has been presented as though this court sat as a court of review exercising appellate jurisdiction. Of course, the order here involved is an order prescribing rates for the future and is therefore an order made in the exercise of the legislative function of the Interstate Commerce Commission. It is well established that such orders are not reviewable on the ground that they are against the weight of the evidence. That is not within the province of the court, to consider the soundness of the Commission's reasoning, to consider whether this decision was consistent with previous decisions or to consider the wisdom of the Commission's actions.

The things that the Court may consider in such a case, [fol. 919] first, whether a rate prescribed is so low as to be consistatory. Of course, that question is not here because there is no allegation to that effect. Then the Court may consider whether there were any irregularities in the proceeding that would viciate the order, whether there were any errors in the application of law, and finally, whether the order of the Commission was so wanting in all support by substantial evidence as to constitute arbitrary action.

Now, those principles, I am sure, the Court is thoroughly familiar with. They have been laid down by the Supreme Court over and over again. In the Virginian Railway case, I will just read a very brief statement from the Court:

"To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached or whether the findings are consistent with those made by it in other cases is beyond our province. Whether the rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of the rules of law."

[fol. 920] Now, proceeding under those principles, your Honros know it has been argued to you here this morning that this finding of the Commission is contrary to previous decisions of the Commission. I will not pursue that subject any further inasmuch as the Court has said that is beyond the province of the Court to consider. It has also been argued to you here this morning that the order of the Commission was unreasonable because it sou-*th* to equalize fortunes and opportunity. The only basis for that allegation is the conclusion of the pleader and perhaps the dissenting opinion of Mr. Commissioner Meyers. But I want to consider with the Court this case from the standpoint of those things that are within the province of the Court.

First, was there any irregularity in the proceeding? The allegation here is that the proceedings were irregular because the Commission on the petition for hearing or reconsideration changed its decision. And they say there wasn't any hearing on the petition for reconsideration. In the first place, no hearing was requested. In the second place, the Commission decided the case on the record that had been made before it which had been the basis of its original opin-

[fol. 921] ion. Now, if that allegation can prevail, then Section 16-A of the Interstate Commerce Act becomes a nullity because it provides specifically that the Commission may on reconsideration, change its finding. Not only that, but it seems to me that the ancient remedy of rehearing must fall, because that is all that was done in this case. The Commission, simply on the record before it, on reconsideration, reached a somewhat modified conclusion.

Now, on the question of the application of rules on law. It is said here that the Commission exceeded its powers

in that it undertook to prescribe rates that would equalize opportunities at geographical disadvantages, the allegation being that the Commission prescribed the rates for the purpose of enabling southern carriers to meet competition in the north and is testing the rates solely by the level of the rates applicable in the north, and that the Commission has undertaken to equalize disadvantages of geographical locations, opportunities, in prescribing rates from the south to the central territory. Now, there is nothing in the Commission's report to justify any such allegation. As I say, it finds its sole support in the conclusion of the pleader and in [fol. 922] some of the statements in Mr. Commissioner Meyers dissenting opinion, which statements are not justified by either the Commission's report or by the record.

Another allegation of similar kind is that to the effect that the Commission's order was based on the assumption that central carriers would obtain the same compensation as they obtained for hauls on traffic for central territory, which, in turn, is based on the erroneous assumption that joint line transportation is required in central territory as in southern territory, and that the joint rates would be divided either on the mile for mile basis or on a basis which would yield plaintiffs the same rates they obtained for transporting coke in the central territory. There, again, there is nothing in the Commission's report on which to base an allegation. The Commission made no assumption on which the rates were to be divided.

The Commission did say that all the central carriers could ask was maximum reasonable compensation for the services performed by them and, says the Commission, under the rates prescribed, they will receive such compensation. Of course, they contemplate that there will be a fair division [fol. 923] of those rates among the carriers participating in the haul, but the question of divisions was not before the Commission; and if the central carriers do not receive what they consider proper divisions, the door is open to them to apply to the Interstate Commerce Commission under the Act to fix for them just and reasonable divisions of these rates for the services they perform. So that the question of divisions, it seems to me, has no place in this proceeding.

Now, then, there is the allegation that the orders of the Commission require plaintiffs to maintain rates which result in undue preference to southern shippers and undue

prejudice to northern shippers in violation of Section 3. Well, in the first place, the pleader is there undertaking to assert the right of another, not his own. In the second place, all of the evidence in the case shows that the southern shippers could not ship and meet competition on any higher rates than those that were ultimate- prescribed. And in the third place, if the Commission had issued an order holding that there was no discrimination resulting from these rates, that order would be negative both in form and in substance, and a negative order, as the Supreme Court has over and [fol. 924] over again held, is not reviewable, and that, of course, is for the reason that in making such an order, the Commission is exercising a legislative function, and it is just as though the legislative branch of Government had failed to act, and that, of course, is something beyond the control of the Court.

So, I come finally to the only question that seems to me is entitled to serious consideration at the hands of this Court, and that is the allegation that the order prescribing the rates for the future is not supported by substantial evidence. Now, of course, we have a great record here, some nearly six hundred pages of transcript, one hundred exhibits, some of them very voluminous, and this Court, of course, cannot be expected to search that record, and as the Supreme Court said in the Florida case, to spill out the facts, but you can take the findings of fact as made by the Interstate Commerce Commission and ascertain from the record whether they find substantial support.

There is no question here, however, of insufficient findings as has been true in a number of cases that the Supreme Court has been called upon to consider. There is no alle- [fol. 925] gation here of any insufficiency of findings. The allegation is that the findings are not supported by substantial evidence.

Now, what are the findings that give support to the Commission's order? Well, in the first place, the Commission found that the rates it prescribed were substantially on a level of those that had previously been voluntarily maintained many years by the defendant. In this last record, of course, the Commission did not undertake to recite all the facts, but it said, "Only such essential facts are repeated here as are deemed necessary."

Going back to this first record on page 285 and 286, the Commission sets forth a revenue test based on the move-

ment in 1933 as to the revenue that accrued under the rates then in effect and as to the revenues that would accrue under this scale 2 which was ultimately prescribed by the Commission.

And, if your Honors will examine those figures, you will find that the revenue which accrued under the rates actually in effect and voluntarily maintained, was just 65/100 of one per cent more than the revenues that would accrue for the same transportation service under the rates prescribed by the Commission and hereunder attacked.

[fol. 926] Now, the Supreme Court of the United States held in the case of L. & N. versus Garrick, 231 U. S., that the voluntary maintenance of rates over a long period of time is in itself substantial evidence to sustain the Commission's order prescribing those rates for future application. So that is the first substantial evidence that there is no contradiction any place of this evidence in this record. No one undertook to maintain that these were not correct figures.

Now, the second. The Commission held that the transportation conditions under which this coke moved from these southern ovens was not substantially more difficult than the transportation conditions obtaining in central territory. It said that the movement here was over the main line. Now, the complaint of my brethren is that in the other cases where the Commission was fixing rates, that applied to some commodity that had general movement, the Commission took the conditions prevailing throughout the south and said that they were less favorable than those obtaining in the central territory. But here, the Commission finally, at our insistence, although at first they would not do so, did confine its consideration of those transpor-

[fol. 927] tation conditions to the transportation here involved, because there was no movement from other points in the south. I submit to your Honors that the Commission is not only justified under the law, but the law requires the Commission to confine its consideration to the transportation conditions involved in the movement and in the rates that it is considering.

Now, the third finding of the Commission, and it seems to me that this also taken alone is sufficient to sustain the Commission's ultimate finding, as to the reasonable maximum rates. The Commission found that the rates it prescribed were on the same level as obtained in central terri-

tory, and of course, there is no question about that. It further found that the rates it prescribed were on the same level as obtained in the southern territory.

Now, the insistence here is as it was before the Commission, that the Commission should prescribe overhead rates that would be higher than the rates obtaining in either of the territories between which the territorial rate is prescribed to apply, and the Commission in its second decision said that it had felt in its original decision it gave sufficient [fol. 928] weight to that fact. Not, as Mr. Commissioner Meyers said, to the fact of the level of the northern territory alone, but to the fact of the level in the south and in the north, and the fact that interterritorial rates should not be higher than the level of rates in each or either of the territories.

Now, there isn't any contradiction in the evidence as to those facts. An exhibit was filed by the witness for the carriers in which he tested the going rates in the south from Birmingham and Chattanooga, the two producing towns, to every town and city having a population of five thousand or over, and showed the level in the south was almost exactly the same as if the column 2 scale had been applied instead of the going rates. Not only that, but a witness for the Alabama producers tested the movement for a year in the south and showed that the revenue accruing to the carriers on coke actually moved was six per cent less than it would have been had column 2 scale prevailed, and from Birmingham, the witness showed by applying the same test that the rates from Chat-anooga were sixteen per cent less than they would be under the column 2 scale. So that the finding [fol. 929] of the Commission that the level of coke rates in the south is on a parity or practically on a parity with the level in the C. F. A. territory or central territory is not only sustained by substantial evidence, but supported by all the evidence. There is absolutely no contradiction.

Now, as to the fourth finding of fact, the Commission found that rates higher than column 2 would greatly restrict, if not prevent, the movement from the south. We are told here by opposing counsel that the Commission had no right to consider the question of movement and the effect on movement, but I call your Honors' attention to the fact that in Section 15-A of the Interstate Commerce Act as amended, and as amended in 1933, it provides that in the exercise of its power to prescribe just and reasonable rates,

the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic. That is the first consideration that Congress enjoin- upon the Interstate Commerce Commission in prescribing just and reasonable rates. It goes on to say they should give consideration to the lowest cost consistent with the furnishing of such service, and to the need of revenue sufficient [fol. 930] to enable carriers in honest, efficient, and capable management to provide such service. But I call your Honors' attention to the fact that the first consideration enjoined on the Commission by Congress, whose arm it is, to prescribe rates with due regard to the effect on the movement of traffic. In the resolution passed by Congress known as the Haucks Smith Resolution, Congress provided the Commission give consideration to the free movement of traffic and proper developments to the country as a whole, referring there, I take it, to the territorial divisions, and enjoining the Commission to see that territorial divisions did not prevent free movement of traffic interterritorially as the development of the country as a whole.

So that we have four findings here, and I challenge opposing counsel to point out any evidence that is contrary to those findings. I submit to your Honors that those four findings taken alone are sufficient to sustain the order of the Commission here. Not only are they sufficient to sustain it under the rules of law which confine your Honors' province in reviewing it so strictly, but those four facts are sufficient to support the wisdom of the Commission's order. And I submit to your Honors that when the Com- [fol. 931] mission first prescribed, as it did, ten per cent higher interterritorially, and by the way, it made that ten per cent applicable to the entire haul, although, of course, transportation conditions on coke in southern territory was the same as coke in central territory—I mean, on coke moved from southern territory, was the same as it was in central territory, as it was when it originated in central territory—that they made the ten per cent increase applicable to the entire haul and made the rates higher than prevailed in either territory.

And it was only finally upon the repeated insistence that they take into consideration those facts that the Commission did render the order prescribing the same level of rates interterritorially as prevails in each of the territories.

Now, as I said, it seems to me that this is built largely

on the conclusions of the pleader and on the dissenting opinion. I just want to read your Honors one sentence from the decision of the Supreme Court about these dissenting opinions. In the case of Interstate Commerce Commission against Delaware and Lackawanna Western Railroad, 220 U. S. 235, the Court said, "The reason given by dissenting [fol. 932] members, except insofar as they rested on the legal proposition we have just stated, proceed on premises of fact which, however cogent they may have been as a matter of original consideration, were not open to consideration by the Court because they were foreclosed by the opinion of the Commission."

So the case has been built on the dissenting opinion, and in that dissenting opinion it is said, "Instead of testing the rates by the standards ordinarily employed, they are here tested solely by the level of rates applicable within the north and the expressed desire of the southern producers or carriers for the same level of rates from the south to the north for competitive reasons.

I submit to your Honors, if you confine the Commission's reasons alone to that of the level of rates obtaining, the Commission itself states that it is not alone on the level of the north, nor principally, but on the level of the south together with the level of the north, and the existence of a parity of rates in the two territories.

Now, if your Honors please, there is much other evidence in this record as you would naturally expect from the size thereof, but I do not believe it is necessary for this Court to [fol. 933] go beyond those four findings of fact as made by the Commission and to which I have called your attention.

Judge Evans: What are those findings, what page of the Commission's report do you find that on, 678?

Mr. Norman: Well, the first point as to the rates beong on a level previously charged is 285 and 286. Now, you understand, your Honors, those findings are not made in the form that a finding of law and fact would be by a Court. That is, the Commission does not say, "We find," but they set forth these facts.

Judge Evans: Yes. They do have, apparently, here on page 678 of that Exhibit D attached to this complaint, certain findings.

Mr. Norman: 678?

Judge Evans: That is Exhibit D of the complaint.

Mr. Norman: I am glad your Honor called attention to that.

Judge Evans: They made formal findings there, though, didn't they?

Mr. Norman: Yes, but they are not so much findings of fact as they are——

Judge Evans: Well, they call them findings.

Mr. Norman: Yes, they call them findings.

[fol. 934] Judge Evans: Now, you made the fourth finding, something to the effect about that they could not ship except from Alabama up here—except on this kind of rates, that fourth finding. The fourth finding you discussed, you said the fourth basis for the fourth finding of that rate has some substantial evidence to support it. You cited four facts or four findings.

Mr. Norman: Yes, sir.

Judge Evans: And one of them was that the rate from Alabama to these points at the higher rate would be preventive of the business or something to that effect.

Mr. Norman: Yes, sir. On page 385 of what I take is Exhibit A with the bill, which is the report of the Commission of April 30, 1936, the Commission said, "The southern carriers are convinced that any rates higher than the column 2 rates would further restrict if not prevent the movement of coke from the south to the central territory, and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect."

Judge Evans: That is what I wanted to ask you about. Supposing they should have found, as your adversary said, that the existence of these rates will prevent or fur-[fol. 935] ther restrict the movement of coke from points in this territory to other points in the territory. In other words, will restrict or prevent the shipment of coke from St. Louis to these places. In other words, you say as a basis for it that on higher than these rates it will prevent shipments from Alabama north and your opponent says these rates, however, will restrict and prevent shipments from coke producing points within the sections to other places. Isn't that correct, Mr. Counsel?

Mr. Day: Yes, it is, your Honor.

Mr. Norman: But the Commission found just to the contrary. The Commission found that the application of this

scale interterritorially will not discriminate against the northern shippers.

Judge Evans: Where did it find that?

Mr. Norman: In both of its opinions.

Judge Evans: Isn't it a fact that this statement of fact I just gave you is true? That if these rates are put in force then this territory is barred to the shippers whose coke shipments originate, say, in St. Louis?

Mr. Norman: No, it certainly is not true. Why, the southern shippers never did ship more than two or three [fol. 936] per cent of the coke into C. F. A. territory, well, of course, to the extent that they ship one car, it probably supplants, or does supplant one car.

Judge Evans: I do not care, it would not be true, but it would restrict.

Mr. Norman: It is a question of whether it unduly restricts.

Judge Evans: In other words, to be a basis of finding of unreasonableness of a rate to say, "Without this we cannot get shipments in there?" Would it likewise not be a basis for saying the rate is unreasonable, for saying that this rate, if put into effect, will restrict shipments in the territory.

Mr. Norman: If it unduly restricted them, yes, but the Commission found it did not.

Judge Evans: It would restrict them if they had enough coke to supply the market, wouldn't it?

Mr. Norman: No, because these rates are the same as have been in effect the past year. They have been able to ship from the south very little coke and the Commission did not have anything in evidence on which it could possibly have based a finding that the movement of the coke from the south would unduly restrict.

Judge Evans: The question is preliminary to a question [fol. 937] I wanted to ask. It raises a question of whether the rate would be illegal. The same point you said was subject to review. May the Commission make a joint rate from "S" to "N" which is lower than the rate on the same commodity in the same locality fixed for groups of northern or "N" railroads?

Mr. Norman: Well, if the conditions justified it.

Judge Evans: Speaking of rates south to north, can they fix a joint rate, which divided under the normal percentage would result in the rate in the northern territory

being lower than what is charged there, the purpose being to facilitate the shipments of the given commodity from south to north. In other words, doesn't that raise a legal question as to their power to do that?

Mr. Norman: It might if they had done any such thing, but you understand the Commission has prescribed the same rate for the same distance, whether it be wholly within central territory, or partly in southern and partly in central. It has not made any distinction. For a six hundred mile haul in Central Freight Association territory, the rates prescribed by the Commission is exactly the same as for a six hundred mile haul from the south to central.

[fol. 938] Judge Evans: Of course, it might not be just a fair test to say just six hundred miles, the relative rate.

Mr. Norman: Yes.

Judge Evans: Supposing the rate was higher in that territory for any shipment that would originate in the territory because they were not going to haul it six hundred miles, but a higher rate.

Mr. Norman: But all on the same scale, whether it be wholly within central territory or partly in southern and partly in *sou*thern.

Judge Evans: Is it on the same scale?

Mr. Norman: All on the same scale.

Judge Evans: Do you agree with that?

Mr. Day: Within Central territory the rates are now somewhat lower by virtue of this Zone C that I spoke about. In other words, we have an arbitrary basis up to Zone C in Michigan. The southern shippers can get up there on a flat C. F. A. normal rate basis.

Judge Barnes: You do not quite answer your opponent's question.

Mr. Norman: Don't you agree, Mr. Day, that the same scale of rates for any given distance is applicable in C. F. A. [fol. 939] territory generally speaking, and from the south to central territory.

Mr. Day: Well, generally speaking, yes, except you have got to bear this in mind; as the Commission's report points out, the movement of coke in C. F. A. territory, that is central territory, is for short distances. The movement from the south necessarily must be for much longer distances, so that you see how rates in different brackets apply. when you take a movement from one territory and contrast it with the movement from another. In other

words, they have got to go at least three hundred miles before they can strike any point in central territory. But aside from that, this scale 2 level of rates is the one that applies in C. F. A. territory.

Mr. Norman: You mean column 2?

Mr. Day: Column 2, and the column 2 rate is also the basis that now applies from the south into central territory.

Mr. Norman: Why, that zone C in Michigan, that is just a very small strip of territory, and I do not think there is any doubt but what the Interstate Commerce Commission did overlook it.

Mr. Day: All the territory north of Saginaw and Bay City.

[fol. 940] Mr. Norman: Compared with all the territory for which the rates were prescribed, it is a very small territory and there is no movement—practically none, and never has been from the south, and we have no objection that the rates from the south be made on scale 3 to that territory, and it was doubtless overlooked by the Commission. If they want that corrected, the rules and regulations apply, and they should do it. They have not done it because it does not amount to anything.

As to these findings that your Honor called my attention to, in docket 3511, I want to state to your Honor that that docket 3511, the order made there is not before your Honors. The record has not been filed that was taken in 3511.

Mr. Day: We are not complaining of the 3511 order. We are standing on it.

Mr. Norman: And those findings are not here.

Mr. Day: Yes, they are.

Mr. Norman: But, when he is saying that he stands on 3511, your Honor, I submit he is asking you to make rates and asking you to substitute your judgment for the Inter-[fol. 941] state Commerce Commission and put into effect the 3511 scale and put aside the scale the Interstate Commerce Commission fixed. I think I have taken more time than I should have, and I thank your Honors for your attention.

Mr. Collins: If the Court please, I think that little, if anything more, need be said than Mr. Norman has already said in defense of the order. I ask the Court's attention, however, particularly to the large report attached as Exhibit D and the summarization of evidence contained in that re-

port, which evidence is not challenged, or the sufficiency of which evidence is not challenged by the bill of complaint. By that, I mean that the bill of complaint while alleging generally, or making the general allegation that the orders are not supported by the weight of the evidence, or are contrary to the character of evidence, nowhere is it said that any particular fact stated in that very good summarization of evidence of the record in the Commission's report is without proof or support of evidence. You will find there beginning particularly on page 643 of Exhibit D the several subject matters into which the fact situation was divided. [fol. 942] For instance, "coke production", "by-product of coke ovens", "cost price of coke", and the thing goes on that way, one topical paragraph after another until very shortly you can see that almost every possible type of information is before the Commission, and is in this record which lies before the Court and was before the Commission.

Now, the only two particulars in which the bill of complaint makes the positive specific allegation that the evidence does not support or justify the orders, on page 14 of the bill of complaint. I take it, then, that we are not called upon to urge all of the evidence, but simply to show that the plaintiffs are wrong in the particulars in which they say the evidence is lacking. In other words, we submit to the Court that the evidence summarized in Exhibit D is obviously sufficient to justify a rate-making body in reaching a conclusion.

Judge Evans: Let us suppose, just passing that question whether there is sufficient evidence to support the rate, but getting down to the point that Mr. Meyers makes in his dissenting opinion—I think your colleague probably made the [fol. 943] matter clear, but I simply do not seem to get this case, and if I ask questions that are simple, you will excuse me, but I do not understand that. Now, do I understand there was a maximum reasonable rate established in this territory for coke?

Mr. Collins: The first report of the Commission finds what the Commission then thought at that time was the maximum reasonable rate.

Judge Evans: The answer is yes.

Mr. Collins: Yes.

Judge Evans: Now, then, is the rate that is now in force, that is fixed here, less than the maximum reasonable rate?

Mr. Collins: Well, the rate is less in cents, but you see what has happened; in 1933 the Commission was of the opinion or the conclusion of facts stated in the report in Exhibit D that a certain rate constituted the maximum reasonable rate. It held a further hearing upon suspension and protest.

Judge Evans: Yes.

Mr. Collins: And reconsidered the matter and concluded that something less was the maximum reasonable rate.

Judge Evans: Yes, but I still ask, is there in force in [fol. 944] this district a maximum reasonable rate for coke?

Mr. Collins: Yes, prescribed by the——

Judge Evans: Second, is that rate higher than the rate that is prescribed for hauling coke in this same district under this ruling here?

Mr. Collins: In the same district?

Judge Evans: In this same northern—what do you call it?

Judge Barnes: Central.

Judge Evans: Central Freight Association.

Mr. Collins: I am not sure that I understand that last question.

Judge Evans: Is the maximum reasonable rate now in the district—now, there is a special rate—this rate that is being considered here, I will call it a special rate or particular rate—is that lower than the maximum reasonable rate?

Mr. Collins: I am afraid I have not made myself clear. This rate the Commission prescribed after three hearings is the maximum reasonable rate. It changed its mind as to what is the maximum reasonable rate.

Mr. Norman: It is the same as that that obtains in central territory.

Mr. Collins: Yes. In other words, your Honors, the rate [fol. 945] originally prescribed by the Commission as the maximum reasonable rate is discarded because the Commission twice since then concluded something else was the maximum reasonable rate. In other words, we cannot be bound, or, rather, the Commission cannot be bound by the state of mind that it reached in the first report. Otherwise, there is no purpose in the remedy provided by statute for further hearing and for further consideration. But the rates now prescribed for application both in central territory and from the south northward into central territory,

are prescribed by the Commission as maximum reasonable rates.

Judge Evans: You term them that, but in reality they are in fact compelled subnormal competitive rates.

Mr. Collins: Well, that is, of course,——

Judge Evans: That is an expression that I do not know what the meaning of it is, but I imagine it is really lower than what might be called maximum reasonable rates.

Mr. Collins: All that I make of that is Commissioner Meyers and those that joined with him in dissent disagreed as to what should be the maximum reasonable rates. That is all I understand that to mean.

[fol. 946] Judge Evans: All right.

Mr. Collins: I was just going to call attention to the fact——

Judge Evans: I will ask you the same question I asked your colleague. If these rates are put in force, will they have a tendency to disturb, or at least, to reduce the amount of shipments in that territory, originating in Central Freight Association territory and reaching a point in Central Freight Association territory?

Mr. Collins: The only answer I can give to that, your Honor, is this: That to the extent that the southern producers are able to lay down coke at those same mileage scale rates in competition with the producers in Central territory, why, then, it necessarily results. If the southern producer can sell a carload of coke to a man who is only buying two, the central producer will only sell one carload. However, as Mr. Norman pointed out, it does not appear there is much reason to fear on the part of the producers in central territory as to such a disastrous outcome or result of this order. If the Court will——

Judge Evans: That is enough. I think maybe I did not get my point to you, if it be a fact that without this rate the [fol. 947] Alabama coke cannot find its way into this territory, then would it not be just as important in determining reasonableness of rates in saying that whatever they did bring in under these circumstances will drive out the business that is already there and originating in that territory and reaching those places.

Mr. Collins: I think it would necessarily follow, your Honor.

Judge Evans: Then that finding of that particular fact would not have any effect, or should not have any on the question of whether this rate is reasonable.

Mr. Collins: I do not think it should. Of course, it necessarily follows, when the southern producer sells a carload of coke——

Judge Evans: Now, is there anything in the suggestion that while there is a maximum reasonable rate, and this is it, in a sense, yet in truth and in fact this is a rate which contemplates a long haul, whereas the other contemplates a short haul? And that while there may be a rate that is uniform and applicable to both sides, yet in view of the real facts, there is no applicability of the long haul to the people whose freight originates in this Central Freight Associa-
[fol. 948] tion? I do not mean any one possibility of it, but whether that is a genuine and real meritorious distinction.

Mr. Collins: Well, as I understand the contention in that connection, it comes down to this: that the higher rates are in the lower mileages. The greater number of cents are for the shorter number of hauls, and that central territory has on an average at least—that is, taking all hauls and averaging them—it has more hauls in that short haul bracket, but to the extent there are short hauls in the south, matching individual hauls with individual hauls, the rates would be the same. In other words, for traffic moving from a point in the south two hundred miles to the Ohio River, I understand from the Commission's report and order they would pay the same rate as would a haul two hundred miles to the Ohio River in competition to each other. So, if counsel for plaintiff understood to argue because of that characteristic of the traffic, namely, this greater abundance of short hauls, it would then be asking the Court to overturn this order in order to try to accomplish the equalization of fortunes and physical situations, the very ground of one of their allegations in attacking the order.

[fol. 949] I am not sure in just what state of conception the situation was left, but I do want to leave it clear that if a shipper from the south and a shipper from the north transport or cause to be transported two shipments the same distance, they pay exactly the same rate.

If the Court will look at page 388 of the Commission's third report marked Exhibit B, you will see there a scale. Now, those rates apply regardless of where the shipment is. There are, as Mr. Day indicated, some things that may affect

them slightly, but at any rate this is what the Commission requires and no more. It is a curious argument to me that by giving the producers in most territories the same rates mile for mile that counsel can see in it an equalization, or an upsetting of geographical circumstances.

It seems obvious that if the shipper, since the southern shippers, generally speaking, have much longer hauls, if they ship six hundred miles under the same mile for mile rate, and if the northern shipper ships two — four hundred miles, then the freight rates, the rate paid by the southern shipper is obliged to amount to more in dollars. He has got [fol. 950] to absorb that much more in his price or else he will not compete with the central territory coke shippers. In short, it seems to me that the whole case which plaintiffs make out is a little short of urging the Court to set aside the Commission's order because it removes what might be called—what in substance is a penalty or tax or assessment against the southern carriers or southern producers for trying to compete in central territory.

Mr. Northcutt: If the Court please——

Judge Evans: Who do you represent?

Mr. Northcutt: The southern carriers. Mr. Northcutt of the Louisville and Nashville, and I have been requested to represent all of the southern carriers. Other counsel are here representing those carriers. There are just one or two points that seem to me might well be cleared up just a little.

Judge Evans: Why is it that the southern carrier is in a different position than the northern carrier?

Mr. Northcutt: We are in a different position than the northern carrier.

Judge Evans: They want the rates in and you do not?

Mr. Northcutt: We want the rates that the Commission has prescribed. The northern carriers have objected to the [fol. 951] rates the Commission prescribed.

Judge Evans: I understand that. Why do you want lower rates?

Mr. Northcutt: We want those because we feel without those our movement of coke will be obstructed, as the Commission found.

Judge Evans: Isn't that what is not permitted, to give to one territory something taken from another territory?

Mr. Northcutt: I think it is clear that the Commission has not undertaken to do that and the effect of these rates will not be to produce that result. What the Commission has

done, as I see it, is to give effect to the full command of Congress in the Interstate Commerce Act that it should prescribe rates which are just and reasonable rates, and in prescribing those rates will observe the mandate in the second paragraph of Section 15-1-A of the Act, that in prescribing just and reasonable rates, it shall take into consideration the effect of rates in the movement of traffic. Now, obviously, it was not the intention of the Commerce Act in the regulation of Interstate Commerce to prohibit or stop the movement of that traffic. It was intended to [fol. 952] facilitate the movement of commerce.

Judge Evans: Surely, but not by any rate could you transfer, irrespective of the rate, just transfer quick business from St. Louis to Alabama.

Mr. Northcutt: Clearly not.

Judge Evans: Your railroad could not get any business unless they got this rate down, which in practical terms means it will take that much away from St. Louis. Now, there cannot be any justification on that second ground you referred to, any justification for it at all, if at the price of giving business to Alabama the rate is put in for the purpose of taking it away from St. Louis.

Mr. Northcutt: For the purpose of taking it away from St. Louis, obviously not.

Judge Evans: The only possible thing, then, would be that to get business, that in itself was so profitable to the carrier, so that one carrier will get the business and others will lose by it.

Mr. Northcutt: Not for that purpose, of course. It might incidentally have that effect.

Now, it has been said here that the movement of a carload of coke from the south will displace the movement of a [fol. 953] carload of coke from some producing point in the north. That may be true, and it may not be true. Coke, as a fuel, comes in competition not only with coke, as this record shows, produced at other coke producing plants, but comes in competition with other fuels, fuel oil, anthracite coal, gas, all heat producing commodities.

Now, there has much been said as to whether or not this rate from the south to the north was prescribed as a maximum reasonable rate or whether it is a subnormal competitive rate. There cannot be any doubt that in the Commission's report, this last report of April 30, 1936, it found that the rates proposed in that proceeding, the rates which were

under suspension in that proceeding were unreasonable rates, and in lieu of those rates which the Commission found had not be- justified, the Commission by its order required the carriers to establish and maintain rates which shall not exceed those prescribed by the Commission. That is to say, the column 2 basis of rates. So by that report and order they did prescribe a reasonable maximum basis of rates.

Bearing in mind what has been said about the competitive [fol. 954] character of those rates, the situation as to that is not different from that existing in the Virginia Railroad case, 272, U. S. That case dealt with rates on coal from Virginia into the northern territory, and it was contended by the Virginian there that the Commission in prescribing as reasonable maximum rates from mines on the Virginian, the same rates which were in effect from mines on other railroads in that territory to the same destination, had prescribed competitive rights. I will read just a few words from the opinion of the Court in that case, the Supreme Court, 272 U. S., 658.

"The argument, as made, that these rates cannot be considered standards of reasonableness because, as the Commission declared in the present controversy, they are the outcome of competitive strain and stress through long periods of development. Now, rates resulting, as the Commission said, as the outcome of competitive strain and stress through long periods of development, those were the rates which the Commission used as the standard by which to measure the reasonableness of the rates from the mines on the Virginian Railroad to the destination territory."

[fol. 955] Further quoting: "And as it has been stated in an earlier case, they may have been made impractical, in all transportation problems that are taken into consideration, in making rates below the maximum reasonable rates, at which they might be maintained."

Notwithstanding that characterization of the rates which the Commission used as a yardstick, there to measure the reasonableness of the rates from mines on the Virginian Railroad, the lower court and the Supreme Court held that was sufficient to support a finding of the Commission in the Virginian case. To the extent that there is no element of competition in these rates from the south to the north, as compared with the rates prevailing in the north, the situation is nothing like as strong as it was in this Virginian case, and furthermore, at the time the Virginian case was

decided I am quite sure that was before the recent amendment to the Interstate Commerce Act and the inclusion of paragraph 2 of Section 15-A, the words that the Commission must in prescribing just and reasonable rates take into consideration the effect of rates upon the movement of traffic.

[fol. 956] As to the evidence the Commission had before it, to which attention was called by Mr. Norman and also Mr. Collins, there should be added, or at least made clear, that the mileage basis of rates which the Commission prescribed for interterritorial application was not only the same as the mileage basis of rates which the Interstate Commerce Commission itself in the case in 194 I. C. C., which was put in evidence this morning as Exhibit 1, the same as that scale, but as shown by the report of the Commission in this docket 3985, that the rates prevailing in the south were on identically the same level, so that the Commission had before it in prescribing an interterritorial basis of rates to apply from the south to the north, a level of rates prevailing in the north and the same level of rates prevailing in the south, and the Commission required the carriers to establish and maintain the same rate level for interterritorial application.

Now, what was the effect of that? The impression has been conveyed, perhaps, that in all instances that had the effect of reducing the rates then in effect from the south [fol. 957] to the north, but as will be seen from the table at the top of page 285 of the Commission's report of March 11, 1935, 208 I. C. C., 285, the effect of the application of the scale prescribed by the Commission, that is, the column 2 basis of rates was, as to Chattanooga, in every instance, I believe, except one, to increase the then existing rate. The Battle Creek rate was increased one cent by the application of column 2 scale of rates.

Now, the column 2 scale was the basis that was ultimately and finally ordered into effect by the Commission's order of April 30, 1936. It is true that the column 2 basis reduced the rates from the Birmingham producing district, but it substantially increased the rate from the Chattanooga district.

Now, the haul as pointed out by Mr. Norman, the revenue on coke moving from the north under the rates in effect prior to March 15, 1935—from Birmingham and Chattanooga districts to territory north of the Ohio River under the then

existing rates was only about four or five thousand dollars less than the rates which would result—or, more than under the rates prescribed by the Commission. So that the general effect of the Commission's order in prescribing the column [fol. 958] 2 basis of rates was to change the total revenue accruing on the tonnage moving during the year 1933 from Birmingham. The Chattanooga rates were based on the figures for 1929, about $5,000.00 per annum.

Now, I just also want to clear up just a little bit this suggestion that the Commission's order of April 30, 1936 was made without a hearing. There is no contention made here that there was not a full hearing in docket 3985 which resulted in the order of March 11, 1935, but it is contended that after that order was made, the Commission on reconsideration set that order aside and made this order of April 30, 1936, and it did that without any further hearing. It was stated here this morning that on these two petitions, that is, the petitions of southern shippers introduced as Exhibit number 6, without any further hearing, and without the taking of any further evidence, the Commission made this order of April 30, 1936. The Commission's rules of practice provide for petitions for rehearing under rule 15——

Judge Evans: Well, let us get our facts specifically and the issues proper here. I did not know that was the basis of an attack on the order. It was a reflection on the order, [fol. 959] but where you have a lot of testimony taken, is there any question but what the Commission can make any order it saw fit after the evidence was closed? I mean by the gentleman on this side of the table.

Mr. Day: No, your Honor, there isn't any question about that if the Commission exercises powers that have been given to it by Congress, including the right to change its order whenever it sees fit, that is all right. We say the circumstances in this case are such that show the Commission acted arbitrarily.

Judge Evans: Yes, that is what I thought. It was not the fact that it did not have the authority to do so after having heard the evidence, but it reflects somewhat—that is, it is these gentlemen's opinion that they acted arbitrarily without sufficient justification.

Mr. Collins: The point I wish to make there is this, that there is a paragraph of that rule of practice of the Commission, paragraph B which makes express provisions for

an application where the party filing it desires to introduce further testimony, desires the case we opened for the taking of further evidence. Now, the petitions which were filed by [fol. 960] the southern interests in this case were not filed for the purpose of reopening the case for further hearing, but only for the purpose of reconsideration of the case upon the record as then made before the Commission, and I filed this morning a copy of the reply filed by the northern lines to those two petitions filed by the southern interests, and in their reply they made no request that the Commission grant any further hearing for the taking of additional testimony. So, I think it is clear that no one party to this litigation before the Commission, or here, is in any position to say that the Commission has declined to hear anything that any party at any time indicated a desire to present to the Commission.

Now, one other point. This morning it was urged that the action of the Commission in this case in prescribing from the south to the north the same rate level on this coke as prevails in the north and which, as I have just shown, is the same as the rate level prevailing in the south, was inconsistent with its action in other cases. I think the Stove case, perhaps, was specifically mentioned as a case that was where the action of the Commission was inconsistent with this case, this action in this case. That there it had [fol. 961] prescribed a rate level from the south to the north higher than that prevailing in the north. Now, that point I think is completely answered by what the Supreme Court said in the Union Pacific case 222 U. S., where it said the Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. Of necessity, the Commission determines each proceeding before it upon the record made in that proceeding. And, the attention of the Court was called this morning to the fact that the Commission in dealing what we may call traffic and transportation data pointed out that these coke producing points, limited in number, only four points, in the Birmingham District, Chattanooga, Tennessee, and Wise County, Virginia, that the coke moved over the main lines of these southern railroads, pointing out that the transportation conditions were different than they were——

Judge Evans: That is all covered by your colleague.

Mr. Collins: I only mentioned that to show that the Commission had a different situation before it in this coke case from that in the Stove case and other cases dealing with [fol. 962] rates generally.

Judge Evans: Didn't your adversary read from the case of the Supreme Court?

Mr. Collins: He read from the Commission's report.

Judge Evans: From the Commission's report?

Mr. Collins: Yes. I believe that is all.

Mr. Payne: If the Court please, the case has been pretty well canvassed by counsel on our side. I just wish to say that I concur in the arguments that have been submitted to you in support of the Commission's order and I have nothing to add except that I would like to make clear one thing, if it is not already clear, and that is that the interterritorial scale prescibed by the Commission and now in effect from the south to the north is exactly the same scale, no lower than that originally prescribed, and in effect in the central territory. That fact is not very clear from the face of the Commission's report itself, and I just wanted to point that out to you.

In the Commission's last report, which is Exhibit B to the bill of complaint, the Commission found that the rate on coke from the Birmingham district, Chattanooga, Tennessee, and the other origins in the south to districts in the [fol. 963] central and Illinois territories for the future won't be unreasonable to the extent that they exceed rates based on the district's scale set forth in the appendix, and on the next page, page 388 is the appendix and it will be noted that the scale there is a distance scale beginning with 140 miles, the first line says 160 miles and over 140 miles, 215 cents per ton and that gradually increases until it gets to the rate of $5.55 per ton for a distance of 1050 miles. Now, in the Commission's answer, it is pointed out that this scale, although not identical with, is similar to the column 2 scale originally prescribed, being identical with the latter insofar as rates for distances between 160 and 800 miles are concerned. So, if you will compare this scale on page 388 with the original column 2 scale in the first report Exhibit D, page 690 of that report, you will find that the rates are exactly the same for each and every distance between 160 and 800 miles.

So that the situation is this: that in the first report the Commission fixed this column 2 scale for application in the

central territory. Notice the appendix 8 in the original re-
[fol. 964] port begins at ten miles and runs up to 1500 miles. Now, that column 2 scale was put into effect by the carriers and is not attacked by either the carriers, by either the northern carriers or the northern shippers. Later the Commission came along and put in the same scale mile for mile from the south to the north so that the complainants here are not complaining because of the low rates from the south mile for mile, they are complaining because the rates are the same, and their contention is they should be higher, although evidence before the Commission showed that higher rates interterritorially than this column 2 scale would be higher than the scale prevailing either in the north or in the south.

Judge Barnes: What is that last statement?

Mr. Payne: That in interterritorial rates that are higher than those so-called column 2 scale would be higher than the rates prevailing in the northern territory or the rates in the southern territory.

Judge Barnes: Do you agree with your opponent that if 100 represents the rate on coke from one point in the Central Freight Association to another point in the Central Freight Association, and 100 now represents the rate on coke from southern territory to territory of the Central [fol. 965] Freight Association, that 110 represents the rate they desire on coke from the points in the southern territory to points in the Central Freight Association.

Mr. Payne: Yes.

Judge Barnes: Now, tell me this: what, generally speaking, is the rate on coke from a point in the southern territory to a point in the southern territory?

Mr. Payne: Your Honor, there is no scale——

Judge Barnes: G-nerally speaking.

Mr. Payne: There is no scale in the south but that is answered on page 385 of the last report, Exhibit B, where the Commission found the rates from Chattanooga, Birmingham, and Wise County, Virginia. They are the three coke producing points in the south. The rates there to southern destinations are in some instances slightly higher and in others lower than they would be if made strictly on a column 2 basis, but they average about the same. From Chattanooga and Birmingham combined to all destinations having a population of five thousand or more, both the present and the column 2 rates average $2.96 per ton, show-

ing that the general level of rates within southern territory [fol. 966] is the same as the column 2 scale prescribed and in effect in the central territory and which have been in effect since March 15, 1934.

Judge Barnes: Taking our 100 and 110, you would say the rates from a point in southern territory to one in southern territory is about 100?

Mr. Payne: About 100.

Judge Barnes: Roughly speaking?

Mr. Payne: Yes. You have this situation, the rate would be represented by 100 in the south, all rates. The rate in the north would be represented by 100, and the interterritorial scale here prescribed and here attacked is also 100.

It is very difficult to understand how a rate between two territories that is higher than that prevailing in either territory can be a reasonable rate. Now, those comparisons, I think, amply support the Commission's order, because on the one hand in the north you have rates prescribed by the Commission; in the south you have rates voluntarily established by the carriers and you have interterritorial rates which were compared with those rates.

Now, in the Supreme Court decisions in two L. & N. cases, one in 227 U. S. page 88, and the other in 238 U. S., the [fol. 967] Court pointed out that such evidence as that has evidenciary value, that the weight of such evidence is for the Commission and that a Commission order when supported by such evidence is within its power. That is all I have to present, unless the Court has some further questions. Thank you.

Judge Evans: Do you want to reply?

Mr. Day: Yes, if your Honors please, I would like to take a few minutes.

The plaintiffs are not asking this Court to sit as an Appellate tribunal to review the proceedings before the Commission. We are not asking the Court to weigh the evidence before the Commission. We are not asking the Court to substitute its judgment for that of the Commission. When Mr. Norman states, as he did, that the Court may not consider whether the decision or order of the Commission is against the manifest weight of the evidence, I think he goes too far. The Supreme Court in the Union Pacific case, 222 U. S. 541, and in a great number of cases since then held that that is one of the things that the Court will

consider and if it finds that an order is against the undisputable or manifest weight of the evidence, that it will be set aside.

[fol. 968] With respect to the relative transportation conditions in the two territories, I think all doubts are set at rest by the language of the Commission in its decision in 208 I. C. C. at 284 in this case, where it said that the southern carriers admit that considering transportation conditions in southern territory, that the rate must be higher than in the central territory to produce the required revenue.

The southern carriers propose the column 2 rates from all southern origin. They assert that such rates will be less than maximum reasonable rates, but within the zone of reasonableness. Now, the question here is not whether these depressed rates are reasonable rates, but whether they are maximum reasonable rates.

With respect to the level of the rates in the southern territory, I conceded this morning that the southern rates, the southern carriers had a number of low coke rates in their own territory, but those rates are voluntarily made by the southern railroads as missionary rates, if you please, or as they are termed by railroad traffic men, "To help their shippers along." They do not provide any fair test of the lawfulness of the rates in central territory. As I explained, [fol. 969] we have no control over that. They apply in a different territory and are made by the different sets of railroads, and if the suggestion made by counsel were to be followed to its logical conclusion, it would simply mean that the southern railroads could fix a level of rates into our territory or within our territory by simply shoving the pegs up and down as they saw fit. With the conditions as they are, obviously, those rates furnish no standard of reasonableness, and as I said, nobody before the Commission contended that they proved rates at the 3511 basis to be unreasonable. Nobody made that contention, based on that evidence or any other evidence.

There may be some misapprehension about the level of the rates and their application in the two territories. Now, just because the rate for 600 miles, we will say, for the sake of argument—not because it is the correct rate—we will say that just because the rate for 600 miles is $6.00, that does not mean that for a 300 mile haul in the central ter-

ritory the rate in our territory is $3.00. That would be, based on the way these scales are made, about $3.80.

Judge Barnes: As Judge Evans suggested to you, that is [fol. 970] another law suit, isn't it?

Mr. Day: I was afraid that perhaps some of the Court might be under a misapprehension about that, thinking that if we hauled the traffic 300 miles in our own territory on a local movement, we would get no more and no less than we did as our part of the haul from the south into our territory where the movement north of the river was for 300 miles. I want to explain that is not the fact. On an interterritorial movement we would get much less than we do on a local shipment for 300 miles.

Mr. Payne reiterated, as other counsel on the other side have, that this basis of rates fixed in the last order is the same as applies in central territory. That is not the fact, and if you turn to page 678 of Exhibit D in our bill of complaint, you will see that the Commission there in finding number 2, the column 3, in other words, the same basis of rates as would apply from the south under the 3511 decision, fixes that column 3 basis as the basis to apply from Detroit, Michigan or from Chicago, Illinois, or from St. Louis, or Irontown, Ohio, to a point in this zone C in Michigan. In other words, the basis is the same as the south-[fol. 971] ern interterritorial scale we are contending for here. Now, that is not true as to the application of these rates from Birmingham, if they ship to this part of lower Michigan; if they ship anywhere else in C. F. A. territory they pay only a flat column 2 basis.

Judge Barnes: I do not understand what you are saying. What is that?

Mr. Day: Do you see finding 2 on page 678?

Judge Barnes: Yes.

Mr. Day: Do you notice the Commission says the rates will be unreasonable between points in central territory and Illinois territory? Unreasonable to the extent that they exceed or may exceed rates based on a distance scale set forth in appendix 8, column 2. That is the column 2 we have been talking about all day, and the C. F. A. basis except as to Michigan zone C. The rate should be as in appendix 8 column 3. That is the southern scale, which rates they find are and will be reasonable, and then they find column 3 will be a reasonable basis from the south.

Judge Barnes: Now, what conclusion do you draw from that?

Mr. Day: That the rates are not the same in the central territory as they are under the application of scale 2 rates [fol. 972] from the south. The south has the best of it.

Judge Barnes: Because of up north here?

Mr. Day: Yes, because of this Michigan.

Judge Barnes: That little piece of territory up in the north?

Mr. Day: It is about half of the lower peninsula.

Judge Barnes: Industrially considered, how important is it considered?

Mr. Day: It is not considered very important industrially, but it is part of our territory. Mr. Norman attempted to classify the findings of the Commission, this statement of what the evidence was, or contentions of the parties was. Now, those are not findings. In a case that went up from this court to the Supreme Court, Chicago, Milwaukee, St. Paul & Pacific Railway against the United States, involving a coal rate order wherein the Commission objected to force certain coal rates on the Milwaukee, or refused to permit them to establish the rates they wanted, and this Court decided the case in favor of the Milwaukee and enjoined the Commission's orders, it went to the Supreme Court and Mr. Justice Cardozo said in the opinion of the Court that the Commission is required to make findings. Findings are [fol. 973] not what statements of the contentions of the parties are, or what the evidence was as offered by those parties. Findings are those such as appear at page 678 of this 3511 decision. It was a decision based upon a voluminous record, hearings that extended over several weeks. As I stated, these are not findings, the fact that the southern railroads contended they needed these rates to move traffic and higher rates would prevent the movement.

And, in connection with that movement of traffic this record shows that the southern people shipped to forty-two states in the Union as well as to the Dominion of Canada and Mexico. Certainly they are not circumscribed in their operations by any rate adjustments. The reverse is true of our shippers in Indiana, Ohio, Michigan and Illinois. Their activities are confined to within a very few miles of their plants.

I attempted to point out this morning that in this 3985 order the Commission reduced every coke rate in central

territory although no such rates were in issue, except those where the northern carriers were attempting to bring a few rates that were below the 3511 scale up to the scale basis.

Our position is in this case that the majority of the Com- [fol. 974] mission desired to reach a certain end and in doing that they arbitrarily concocted this last order in 3985; they rode rough-shod over the record an- disregarded all the evidence in order to reach the conclusion they did. Therefore we ask that the orders be set aside as prayed in the complaint. Thank you.

Mr. Allen: If the Court please, I speak for some of the coke shippers in the northern territory. I have no desire to overburden this already over-burdened court, but there are two matters that I believe may have been misconceived. One is that the Court may be of the opinion that the southern shippers paid the same rate mile for mile that the northern shippers pay. Now, if the Court understands that that is not the fact, that point is disposed of without my saying anything further. But, that is not the fact. In this scale that was prescribed in the original opinion, in I. & S. 3511 it appears that for 100 miles and over 80 miles a shipper would pay under column 2 rates $1.75. For 500 miles, which I am sure the southern producers ship, they would pay $3.85. Now, if the northern shippers pay upon the same basis as the southern shippers for 100 miles, the northern shippers would pay seventy-seven cents instead of $1.75. If the [fol. 975] southern shippers paid on the same basis as the northern shippers mile for mile, that is to say, they would pay $8.75, while, bear in mind, that for 100 miles the rate is $1.75 and for 500 miles $3.85. So they are not on the same basis, because it is a well known rule of rate making that rates for short hauls are higher than they are for long hauls, and they decrease as the distance increases.

Now, we have a very peculiar situation here in the north that the southern gentlemen do not have. We have a large industrial territory in the north and the industries are very close together. We have coke plants at Duluth, Minnesota. We have coke plants at Minneapolis, Minnesota. We have coke plants at St. Louis, Missouri. We have coke plants at Chicago. We have them at Detroit. We have them at Toledo. We have them at Erie. We have them at Indianapolis and Terre Haute. I hope I have not missed any because I

did not intend to, but it is very apparent that the northern shippers in this territory cannot ship very far, because if the rates are the same, they are going to cross and meet their competitors. So they are confined to short territory around their markets.

That is not true of the south in coming into this market. [fol. 976] They can move long distances, and while they do that meet all the competition of the northern people, but still they have to meet that anyway.

But the northern shippers are really restricted and confined to this territory. They cannot get out. They cannot ship south of the Ohio River. They cannot ship to certain points on the Ohio River. So it is very important that the northern shippers, in order to stay in business, must have rates which will move their traffic. Now, I say that it is obviously unfair for these southern shippers to have a scale of rates which decreases so that there is a disparity of the rates that we pay and the rates that they pay, and the only purpose of this whole proceeding, as I see it, was to permit the southern fellows to dump their surplus coke into this territory. They sell what they can in their own territory and then come into ours to sell their surplus here in order to keep up their production. I wanted to explain that we do not pay mile for mile and we have not a chance to pay mile for mile. Now, it is a very peculiar situation when these Alabama people can come to Chicago where there is the largest coke producing plant in the world and sell, and have sold in a year [fol. 977] over 62,000 tons of coke. Whether they sold it at a loss or whether they made any profit on it, I do not know.

I think that the report of the Commission in the I. & S. 3511 absolutely shows that the Commission's decision was arbitrary because, mind you, this has not been overruled and changed except by the level of the rates, but on page 284 of that opinion, they say this: "The southern carriers admit that considering transportation conditions in southern territory as a whole, rates must be higher than in central territory to produce the required revenue." This, they claim, is due to the lower volume of traffic on the whole rather than to operating difficulties. They admit it and I am sure the railroad is not going to admit that a rate is too low if they can help it.

Now, the report goes on and says with the exception of the Louisville & Nashville and Interstate, the southern car-

riers propose the column 2 rates. Those are the rates that have been established now for application in both of these territories from all southern origins. They assert that such rates will be less than maximum reasonable rates, but within the zone of reasonableness. The Louisville & Nash-
[fol. 978] ville and Interstate admit that some of their rates are less than maximum reasonable rates, but contend they were established to move coke and should not be disturbed. Now, the record absolutely shows, I think, that these column 2 rates are just and reasonable rates. Now, if they are just and reasonable rates, maximum rates, I mean, in the Central Freight Association territory, and if the southern carriers admit that considering transportation conditions in southern territory as a whole, they should be higher to be more than reasonable maximum rates, than the action of the Commission in establishing these rates from southern territory to northern territory and from points in northern territory to other points in northern territory, is absolutely arbitrary. It cannot be anything else and the Court in such a situation, I am sure, has power to set aside those rates.

Now, I would like to say a few words about this traffic density proposition. People locate their plants in certain districts for certain purposes. The northern people have located their coke plants within proximity to the big markets. When they do that, they have got some disadvantages, because they are far away from their sources of
[fol. 979] supply. It is well known that coke must be made of coal for the most part, which is secured in the southern districts.

Now, the northern people have got to pay high coal rates to get their coke up to these markets, but they have chosen that. They say that is all right, "We will pay the high prices on our coal because we are on the ground where there is a large consumption and we can afford to pay that, because the freight rates to the market are not going to be so high."

The southern people have located their plants in the southern districts where they pay practically nothing to haul their coal into their plants and they pay much less for labor. Now, there are two situations. All the northern people ask is a freight rate adjustment, and all they have asked of the Commission is to move their coke to this

northern territory. They cannot get south. But the southern people say, "We want rates which will enable us to get into this northern territory and displace the coke which ought to be sold there."

Now, on the question of traffic density, and that I think is the only proposition in this case, if the rates from the south were made as rates usually are, the Commission [fol. 980] would have taken account of the lower traffic density in the south and would have plussed the rates from the south to the northern territory. They cannot help it. They have done it in many cases. When we sell our sulphate of ammonia, they plus our rates to the south, and for years carriers have been filing petitions trying to get those fertilizer rates up because of the higher operating conditions in the south. Now, the only way the Commission ever escaped that in this case is to say, "Yes, we will admit that the operating conditions in the south are more difficult generally, that the traffic conditions generally are lower, but if you check the lines of railroad over which this coke actually moved north, the traffic density appears favorable with the traffic density on the lines in the north." I say we are entitled not to a special situation, but by reason of the benefit of our location we are entitled to have the benefit of the traffic density generally in the south and that, the Commission absolutely disregarded.

Now, the Supreme Court of the United States said that it is not the province of the Interstate Commission to equal- [fol. 981] ize fortune, location, and opportunity and things like that. All we want is a fair break. We have not got it. I say the Commission on the very admission of the southern carriers, has acted arbitrarily, that as a matter of law they have acted arbitrarily in making these rates in the same level interterritorially as they have in the northern territory, because the only thing they have looked at is competition. In other words, we are going to let the southern shippers come into this territory and put their surplus in this territory, but there is no adjustment whereby the northern man can get down into the southern territory. We do not get that break when we are going south. Not at all. The shoe is on the other foot and I say for that reason and for the other reasons that have been stated here that this action of the Commission is arbitrary, capricious, contrary to law, and that you gentlemen have an absolute right to set the order aside. Thank you.

Judge Evans: There are not many questions that are more complicated and difficult to dispose of than a freight rate case, but we think that further consideration of the case by us would not help a great deal. We are convinced [fol. 982] that this is a maximum reasonable rate and that there is evidence to support its establishment. Such evidence is to be found in the rates that are in force in the south and also in this particular territory. Such being the conclusion, we are of the opinion that the bill must be dismissed. The defendants will draw findings, submit them to the other side and then present them to us. Now, do not make findings that are treatises on the subject of Interstate Commerce law. Make them applicable and pertinent to this particular case and so they will be of same assistance to us. Opposing counsel, when they get those proposed findings should try to either go over and make some corrections, to get the facts correct, or if they cannot, they should submit proposed findings on the other side to the Court, the findings being of sufficient detail but not a story of all the evidence, so that we can get help from them, for we have to make the findings. We will make the findings, mind you, we are not asking you to make our findings, but we want you because of your familiarity with dates and the story and different things, we want you to make and submit to us proposed findings, but remember what a proposed finding is, not a rehash of all the evidence or any [fol. 983] propositions of law. So, draw them and submit them as promptly as you can to your opponents. You, in turn, have ten days in which to go over them and add to them, or make proposed findings and send them to us. Send them to the Clerk of the District Court for us, three copies. That is all for today.

Which were all the proceedings had and all of the evidence received or offered in the hearing of the above entitled cause.

[fol. 984] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING STATEMENT OF EVIDENCE

The foregoing Statement of Evidence is a true, complete and properly prepared statement of the substance of all of

the testimony and evidence introduced and admitted upon the trial of the above-entitled cause in the District Court of the United States, Northern District of Illinois, Eastern Division, all particulars not essential to the decision of the questions presented being omitted, and the same is hereby settled, allowed and approved as the Statement of Evidence in the Appeal of the above-entitled Court.

Dated this 1st day of December, A. D. 1937.

Evan A. Evans, Circuit Judge. Charles E. Woodward, District Judge. John P. Barnes, District Judge.

[fols. 985-986] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 987] Citation, in usual form, showing service on Elmer B. Collins et al. omitted in printing.

[fol. 988] [Endorsed:] District Court of the United States, Northern District of Illinois, Eastern Division. Equity No. 15266. Baltimore & Ohio Railroad Company et al., Plaintiffs, vs. United States of America et al., Defendants. Citation on Appeal. Filed Dec. 8, 1937, at —— o'clock. Henry W. Freeman, Clerk.

[fol. 989] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed December 15, 1937

Now come appellants in the above entitled cause, by Leo P. Day, their solicitor, and file this statement of the points upon which appellants intend to rely and of the parts of the record which they think necessary for the consideration thereof, together with proof of service of the same, upon appellees.

Statement of Points to Be Relied Upon by Appellants

(1) The District Court erred in finding that the evidence supports the findings of the Commission, and that in mak-

ing its order dated April 30, 1936 in Investigation and Suspension Docket No. 3985, the Commission did not exceed its authority, and that said findings support the con-
[fol. 990] clusions and its order of April 30, 1936 prescribing maximum reasonable rates for the transportation in question.

(2) The District Court erred in finding that the Commission's conclusion that the rates prescribed in the order of April 30, 1936, for future application will be maximum reasonable rates, is supported by evidence.

(3) The District Court erred in finding that the Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers is supported by the evidence.

(4) The District Court erred in finding that the Commission properly gave consideration to the effect of rates upon the movement of traffic.

(5) The District Court erred in finding that the Commission's conclusion that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, distance considered, than the rates applying in either territory through which said interterritorial traffic passed.

(6) The District Court erred in finding that the Commission's order of April 30, 1936, in Investigation and Suspension Docket No. 3985 is valid.

(7) The District Court erred in finding that it was not required to pass upon the validity of the Commission's order of March 11, 1935.

(8) The District Court erred in finding that the order of April 30, 1936, in Investigation and Suspension Docket No.
[fol. 991] 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.

(9) The District Court erred in finding that the bill of complaint herein should be dismissed for want of equity at plaintiffs' costs.

(10) The District Court erred in failing to find, as it should have done, that the orders of the Commission in Investigation and Suspension Docket No. 3985, dated March 11, 1935 and April 30, 1936, and the order in Investigation and Suspension Docket No. 4198, dated April 30, 1936, are arbitrary and unjust, are contrary to the evidence of record and without support of any substantial evidence properly before the said Commission in the proceedings in which they were made, and that said findings are against the indisputable character of, and the manifest weight of, the evidence.

(11) The District Court erred in failing to find, as it should have done, that the said orders of the Commission prescribe and require plaintiffs to maintain rates which are less than reasonable maximum rates, and that the action of the Commission in making them was therefore arbitrary, unjust and without lawful authority.

(12) The District Court erred in failing to find, as it should have done, that the said orders of the Commission prescribe and order plaintiffs to publish and maintain rates which result in the undue preference of manufacturers and shippers located in the South and undue prejudice of the manufacturers and shippers located in the North, which these carriers by the provisions of Section 3 of the Interstate Commerce Act are forbidden to publish and maintain.

(13) The District Court erred in failing to find, as it should have done, that the said orders of the Commission [fol. 992] arbitrarily required reductions in rates that had been published and made effective in purported compliance with the Commission's decision in Investigation and Suspension Docket No. 3511, notwithstanding that those rates were clearly not involved in Investigation and Suspension Docket No. 3985.

(14) The District Court erred in failing to find, as it should have done, that there has been no understanding or agreement between the central territory lines, on the one hand, and the southern carriers, on the other, as to the divisions to be received by either or both of them out of the rates fixed by the Commission in Investigation and Suspension Docket No. 3985.

(15) The District Court erred in failing to find, as it should have done, that the Commission's order of April 30, 1936, which prescribed and required petitioners to publish and maintain and charge the third successively lower basis of rates without having taken or heard any evidence or facts but made solely on petitions or pleadings, was arbitrary and unlawful and denied petitioners the hearing provided for by law.

(16) The District Court erred in failing to find, as it should have done, that the said orders of the Commission were not supported by basic findings that the rates prescribed were reasonable maxima.

(17) The District Court erred in failing to find, as it should have done, that the Commission is without lawful power or authority to compel petitioners to join the southern carriers in rates made lower than reasonable maxima, in order to enable southern producers of coke better to compete with producers in the North.

[fol. 993] (18) The District Court erred in failing to find, as it should have done, that the said order of the Commission requiring petitioners to charge shippers in the North reasonable maximum rates and compelling petitioners to join the southern carriers in rates from the South to the North less than reasonable maxima, would require petitioners to engage in a prejudicial and preferential practice in violation of law.

(19) The District Court erred in failing to find, as it should have done, that the said orders of the Commission were beyond its lawful powers in that the rates therein prescribed were based on competitive conditions between shippers and railroads in the South on the one hand and shippers and railroads in the North on the other hand, and in utter disregard of transportation conditions.

(20) The District Court erred in failing to find, as it should have done, that transportation conditions applicable in connection with joint through rates on coke from the South to the North are more onerous than apply within the North, and that reasonable maximum rates on coke from the South to the North therefore must be higher than are applicable within the North.

(21) The District Court erred in failing to find, as it should have done, that the Commission arbitrarily disregarded and rejected certain well known and long-recognized standards for testing and prescribing reasonable maximum rates, and in fact tested and fixed the rates on coke from the South to the North by a standard or a basis contrary to those usually employed.

(22) The District Court erred in failing to find, as it should have done, that the rates fixed by the Commission [fol. 994] on coke from the South to the North tend to equalize disadvantages of geographical location, opportunities or abilities, which is beyond the lawful powers of the Commission to do.

(23) The District Court erred in failing to find, as it should have done, that there was no substantial evidence before the Commission to support its conclusion that the prescribed rates are reasonable maximum rates.

(24) The District Court erred in failing to find, as it should have done, that the indisputable character of the evidence before the Commission establishes that rates fixed and ordered are less than reasonable maximum rates.

(25) The District Court erred in failing to find, as it should have done, that the rates applicable to the transportation of coke in the North are subnormal rates, as are the rates voluntarily maintained by the southern carriers within the South, and neither basis affords a lawful or proper criterion for fixing maximum reasonable rates from the South to the North.

(26) The District Court erred in failing to find, as it should have done, that there was no evidence to support the erroneous assumption by the Commission that the share of the petitioners out of the joint through rates prescribed would be equivalent to the earnings they would receive for the transportation of coke within their own territory for like distances at the same level of rates.

(27) The District Court erred in failing to find, as it should have done, that the action of the Commission in suspending in its Investigation and Suspension Docket No. 4198 the tariffs naming rates on coke from southern manufac- [fol. 995] turing points to destinations in central territory and not the concurrences of central territory carriers pro-

viding for rates on the maximum reasonable basis previously prescribed by the Commission created a conflict between tariffs and concurrences which deprived petitioners of their right to reasonable compensation based on the reasonable and remunerative joint through rates so prescribed by the Commission for which concurrences were in effect.

(28) The District Court erred in failing to issue the injunction prayed for in the petition herein.

Designation of Parts of Record to be Printed

Appellants hereby designate for printing the entire transcript of the record, which they think necessary for consideration in determining the appeal herein, but not including the original exhibits which have been certified to this court separately and not as part of said transcript of record.

Leo P. Day, Solicitor for Appellants.

[fol. 996] Service of the foregoing statement of points to be relied upon by appellants and upon the appeal herein, and designation of parts of the record to be printed, and receipt of a copy hereof, are hereby admitted and acknowledged by the following.

United States of America, by Elmer B. Collins.

This 8th day of Dec., 1937.

[fol. 997] [File endorsement omitted.]

[fol. 998] In Supreme Court of the United States

Stipulation as to Printing Record—Filed December 21, 1937

It is stipulated by the parties hereto that the following shall govern the printing of the record on appeal in the above-entitled cause:

The entire record shall be printed with the exception of the exhibits introduced in the proceeding before the Interstate Commerce Commission entitled Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, introduced in the court below as part of the certified record of the evidence before the Com-

mission in said proceeding and certified to this court as original exhibits.

It is further stipulated that said original exhibits shall have the same force and effect and be treated for all pur-
[fol. 999] poses as if they were a part of the printed transcript of the record and may be referred to by counsel for any party hereto in his briefs and arguments before this Court.

It is further agreed that this stipulation shall be printed by the clerk as part of the record on appeal.

Leo P. Day, Solicitor for appellants. Elmer B. Collins, Solicitor for the United States of America. J. Stanley Payne, Solicitor for the Interstate Commerce Commission.

December 15, 1937.

[fol. 1000] [File endorsement omitted.]

Endorsed on cover: File No. 42,119. N. Illinois, D. C. U. S. Term No. 638. Baltimore and Ohio Railroad Company et al., appellants, vs. The United States of America, Interstate Commerce Commission, et al. Filed December 15, 1937. Term No. 638, O. T., 1937.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 638

BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION AND STATEMENT AS TO JURISDICTION.

Leo P. Day,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 638

BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION AND STATEMENT AS TO JURISDICTION.

Come now the appellants in the above-entitled cause and present this their motion for leave to file statement indicating the basis on which this Court has jurisdiction to review on appeal the decree entered therein. As grounds for their said motion appellants respectfully show:

I.

In this case railroad appellants are appealing from a decree of a specially-constituted three-judge court, dismissing their bill to enjoin and set aside certain orders of the

Interstate Commerce Commission, requiring reductions in rates for the transportation of coke. Appellants contend that the Commission in making said rate orders acted arbitrarily and otherwise exceeded its lawful powers and authority. That the basis on which this Court has jurisdiction to review the decree of the three-judge court are fully set forth in appellants' statement attached hereto.

II.

That appellants, through oversight, misapprehension and misunderstanding of Rule 12 of the Court's Rules of Practice, failed to present to the District Court a typewritten statement particularly disclosing the basis on which it is contended that this Court has jurisdiction upon appeal to review the judgment or decree in question, but instead has filed such a statement with the Clerk of this Court and served copies on appellees and other interested parties.

III.

That copies of this motion are being served on all parties to this case, calling their attention to paragraph 3 of Rule 12 of the Rules of Practice before this Court.

Wherefore, appellants respectfully move the Court to grant them leave to file statement showing basis on which the Court has jurisdiction to review the decree herein on appeal.

Respectfully submitted,

LEO P. DAY,
Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 638

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA ET AL.,

Appellees.

STATEMENT BY APPELLANT OF BASIS ON WHICH COURT HAS JURISDICTION TO REVIEW DECREE ON APPEAL.

MAY IT PLEASE THE COURT:

In this suit appellants sought to enjoin, annul, suspend and set aside certain orders of the Interstate Commerce Commission, made on March 11, 1935, and April 30, 1936, in proceedings before the Commission known as its Investigation and Suspension Docket No. 3985, entitled "Coke from Alabama and Tennessee to Central Territory" and Investigation and Suspension Docket No. 4198, entitled "Coke from Southern Points to Central Territory." The suit was heard in the District Court by a three-judge court, convened pursuant to the Act of Congress of October 22, 1913 (38 Stat. L. 220, Title 28, U. S. C. A. 47). On January

21, 1937, a final decree was made by the court dismissing the petition of appellant for want of equity. This appeal is prosecuted from that decree.

(1) The jurisdiction of this Court to review said decree on appeal is sustained by the following statutory provisions. The Urgent Deficiencies Act of October 22, 1913 (38 Stat. L. 219-220) confers upon the District Courts of the United States the jurisdiction theretofore vested in the Commerce Court, including jurisdiction over all suits brought to enjoin, suspend, annul, or set aside any order of the Interstate Commerce Commission. The same act provides, with reference to an appeal from the final decree of a District Court in such action, as follows:

> "A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases." (38 Stat. L. 220; Title 28, U. S. C. A., Sec. 47.)

By the Act of February 13, 1925, entitled "An Act to amend the Judicial Code and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court, and for Other Purposes," Section 238 of the Judicial Code was amended to provide:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Act or parts of Acts, and not otherwise:
>
> * * * * * * *
>
> (4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved

October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend or set aside orders of the Interstate Commerce Commission other than for the payment of money." (43 Stat. L. 938; Judicial Code, Sec. 238; Title 28, U. S. C. A., Sec. 345.)

(2) The decree sought to be reviewed upon this appeal was made and entered on January 21, 1937. The petition for appeal herein, together with an assignment of errors was presented, and the order allowing the appeal was entered on March 17, 1937. The appeal bond was approved and filed on March 17, 1937. The citation was issued on December 2, 1937, and after due service was filed on December 8, 1937. The cause was docketed in this Court on December 15, 1937.

(3) This suit was instituted by appellants for the purpose of enjoining, annulling, suspending and setting aside certain orders of the Interstate Commerce Commission, made on March 11, 1935, and April 30, 1936, in proceedings pending before the Commission known as its Investigation and Suspension Docket No. 3985, entitled "Coke from Alabama and Tennessee to Central Territory" and Investigation and Suspension Docket No. 4198, entitled "Coke from Southern Points to Central Territory," requiring the establishment and maintenance of reduced rates on coke from points in the States of Alabama, Tennessee, and Virginia to destinations on the railroad lines of appellants in the States of Ohio, Michigan, Indiana, New York, Pennsylvania, and other states.

On June 30, 1933, the Interstate Commerce Commission in proceedings before it known as its Investigation and Suspension Docket No. 3511, entitled "Coke between Points in Central and Illinois Territories," prescribed *inter alia* a mileage scale of reasonable rates on coke from the southern

origins to the destinations in the States of Ohio, Michigan, Indiana, New York, Pennsylvania, and other states, as aforesaid, and also a mileage scale of reasonable rates to be applied on coke moving between points in the latter states, which comprises so-called Central Territory, and are served by appellants. The orders of the Commission made on March 11, 1935 and April 30, 1936, in the proceedings known as its Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory, and Investigation and Suspension Docket No. 4198, Coke from Southern Points to Central Territory, which appellants in this suit sought to enjoin, annul, suspend and set aside, resulted in successively lowering the rates on coke from the southern origins to Central Territory destinations to a level substantially less than reasonable maxima and lower than the reasonable maximum basis of rates which the Commission has the lawful power or authority to prescribe.

The petition filed in the District Court alleged that the orders made by the Commission on March 11, 1935 and April 30, 1936, requiring appellants to establish and maintain the unreasonable rates on coke from southern origins to Central Territory destinations, were unreasonable, arbitrary, unlawful and beyond the power or authority of the Commission; that there was no evidence in the record of the proceedings before the Commission which justified the conclusions reached; that the orders should be set aside, annulled and suspended, and their enforcement, execution and operation be forever enjoined.

After a hearing in the District Court, a decree was entered on January 21, 1937, dismissing the petition of appellants for want of equity. The decree of the lower court constituted a final judgment within the meaning of the Act of Congress of October 22, 1913 (38 Stat. L. 220), and pursuant to the provisions thereof, and of the Act of Congress

of February 13, 1925 (43 Stat. L. 938), a direct review of this final judgment and decree may be had in this Court.

(4) Cases which sustain the jurisdiction of this Court to review said decree are as follows:

Virginian Railway Company v. *United States*, 272 U. S. 658;

United States v. *New York Central Railroad Company*, 263 U. S. 603;

Dayton-Goose Creek Railway Company v. *United States*, 263 U. S. 456;

Stafford v. *Wallace*, 258 U. S. 495, 512;

Louisville & Nashville Railroad Company v. *United States*, 238 U. S. 1;

United States v. *Baltimore & Ohio Railroad Company*, 225 U. S. 306.

Respectfully submitted,

LEO P. DAY,
Solicitor for Appellants.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937

No. 638

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,

Appellants,

VS.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,

Appellants,

VS.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS

This is an appeal from a decree of the United States District Court for the Northern District of Illinois [constituted as provided in the Urgent Deficiencies Act of October 22, 1913 (38 Stats. 219)], which dismissed a bill filed in behalf of nineteen railroads to set aside and enjoin certain orders of the Interstate Commerce Commission. The orders complained of successively reduced rates for the transportation of coke, coke breeze, coke dust and coke screenings from producing points in the Chattanooga, Tennessee, Birmingham, Alabama, and Wise County, Virginia, districts to destinations in the

states of Ohio, Indiana, Michigan and Illinois, collectively known and referred to in freight rate parlance as central freight association territory, and hereinafter referred to, for convenience, as central territory.

1. REFERENCE TO OFFICIAL REPORT OF OPINION OF LOWER COURT AND TO REPORTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

There was no opinion by the lower court in this case, but it made twenty-three findings of fact and stated nine conclusions of law which appear at pages 161 to 168 of the printed record.

Two reports were made by the Commission in the proceedings before it, the case being entitled *Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory.* The first one, dated March 11, 1935, is reported at 208 I. C. C. 281, and was accompanied by an order, not officially reported. This report and order appear at pages 15 to 33, inclusive, of the printed record. By this order the appellants and their southern railroad connections were required to cancel, on or before May 1, 1935, certain schedules of rates which had been published and filed with the Commission for the purpose of making uniformly effective the mileage scale of coke rates from southern origins to central territory that had previously been prescribed by the Commission in *Investigation and Suspension Docket No. 3511, Coke Between Points in Central and Illinois Territories,* and cases related therewith, reported at 194 I. C. C. 640. There had also been prescribed in the same I. & S. 3511 proceedings a scale of coke rates for application between points in central territory, which basis was made effective throughout that territory almost immediately following the issuance of the Commission's report and orders therein. The latter decision and orders entered in connection therewith appear at pages 42 to

129, inclusive, of the printed record. The second report of the Commission in Investigation and Suspension Docket No. 3985, dated April 30, 1936, is reported at 215 I. C. C. 384, and was also accompanied by an order which is not officially reported. This report and order, appearing at pages 33 to 40 of the printed record, required establishment by these appellants and their connections of the third successively lower basis of rates on coke from southern points to central territory destinations. A dissenting opinion by Commissioner Meyer, was joined in by Chairman Mahaffie, and Commissioners Porter and Miller. (R. 37-38)

The Commission also entered an order, dated April 30, 1936, in a proceeding before it entitled *Investigation and Suspension Docket No. 4198, Coke from Southern Points to Central Territory.* This order is not officially reported, but it appears at pages 40 to 42 of the printed record. It suspended tariff schedules of appellants, which would have made effective the mileage scale of rates fixed in the Commission's order, dated March 11, 1935, in Investigation and Suspension Docket No. 3985.

2. STATEMENT OF THE CASE.

The proceedings before the Commission known as Investigation and Suspension Docket No. 3511 (194 I. C. C. 640), involved *inter alia* a complaint of the Citizens Gas Company of Indianapolis and others (Docket No. 23375, and Sub. No. 1 thereto), wherein it was alleged that the rates on coke accorded producers at the Birmingham, Ala., Chattanooga, Tenn., Harlan County, Ky., and Wise County, Va., districts to destinations in central territory were unduly preferential of the southern producers, and unduly prejudicial to the complainants, in violation of Section 3 of the Interstate Commerce Act. (U. S. C. A. Title 49, Section 3)

There was also embraced in those proceedings a complaint of the Alabama By-Products Corporation and others (Docket No. 22052) in which it was alleged that the rates on coke from the Birmingham, Ala., district to destinations in central territory were unreasonable and unduly prejudicial as compared with the rates accorded their competitors located at Chattanooga, Tenn., and at various producing points in central territory. The complainants in the cases referred to prayed that the Commission prescribe reasonable, nonprejudicial and nonpreferential rates to central territory destinations. Their complaints were consolidated with other coke rate cases pending before the Commission and were heard on a joint record before an examiner designated by the Commission.

In its decision in those proceedings the Commission included in its ultimate findings the following:

1. That the schedules under suspension in Investigation and Suspension Docket No. 3511 have not been justified.

2. That the interstate rates on coke, in carloads, between points in central territory and Illinois territory, assailed in Nos. 23173, 23173 (Sub. No. 1), 23375, 23375 (Sub. No. 1), and 23888 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates based on the distance scale set forth in Appendix 8, Column 2, except that to destinations in Michigan Zone C the rates should be based on the distance scale set forth in Appendix 8, Column 3, which rates we find are, and will be, reasonable.

3. That the rates on coke, in carloads, from Ashland, Ky., and Ironton and Portsmouth (New Boston), Ohio, to destinations in Wisconsin, except that portion in Illinois territory, Iowa, Missouri, Nebraska, South Dakota, and Minnesota, assailed in Nos. 23173 and 23173 (Sub. No. 1) were not un-

reasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, (*a*) to destinations in Zone 1 and extended Zone G in Wisconsin of western trunk-line territory as described in *Western Trunk-Line Class Rates*, 164 I. C. C. 1, 200, 210, rates based on the distance scale set forth in Appendix 8, Column 3, and (*b*) to destinations west and south of Zone 1, rates based on that scale applied to the entire distance, plus the distance arbitraries set forth in Appendix 8, Column 4, for application to that part of the hauls west and south of Zone 1, which rates we find are, and will be, reasonable.

4. That the rates on coke, in carloads, from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan assailed in No. 22052 were not unreasonable but are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, rates based on the distance scale set forth in Appendix 8, Column 3, which rates we find are, and will be, reasonable.

5. That in applying the scales herein found reasonable distances should be computed over the shortest possible routes via existing connections for the interchange of carload traffic without transfer of lading, and specific point-to-point rates should be published.

9-A. Our findings herein are not to be construed as precluding reasonable groupings.

It is also important to note in connection with the foregoing decision the following statement by the Commission (R. 88):

"The question of undue prejudice arises in connection with all of the complaints except no. 23160 (sub-no. 1). These allegations are rather general in nature and are supported in the main merely by a statement of the differences in the rates. Where the question was dealt with more in detail the proof

is at best indefinite, and in our opinion insufficient to support a finding of undue prejudice. *It is believed that the establishment of the rates hereinafter prescribed as maximum reasonable will remove any prejudice that may exist in the assailed rates.*" (Italics ours)

In conformity with the decision therein and the orders which accompanied it, these appellants, on March 15, 1934, by appropriate tariffs, made effective generally between points throughout their own (central) territory the scale of coke rates prescribed by the Commission. In doing so, they fully expected that like action would be taken by the southern railroads, who publish tariff schedules for account of the central territory lines and themselves, in connection with the joint through rates on coke from southern producing points to central territory destinations. The originating lines in the South, however, failed to establish generally the interterritorial basis fixed by the Commission, but instead made no changes in the rates save in those cases where the previously existing rates were higher than the level prescribed. The requests and demands of the appellants that interterritorial rates be placed at the prescribed maximum reasonable level as the Commission anticipated, and as appellants themselves had done in treating the rates within central territory, were entirely disregarded by their southern railroad connections and it became necessary, therefore, in order to give complete effect to the orders of the Commission in those proceedings, for these appellants to issue to the southern railroads limited concurrences, as provided for by the rules and regulations of the Commission, requiring that the coke rates prescribed by the Commission from origins in the South to central territory destinations be published and made uniformly effective from the coke manufacturing districts in Alabama, Tennessee and Vir-

ginia, in the same manner as coke rates between points in central territory, contemporaneously prescribed by the Commission in the same decision, had previously been made uniformly effective by the appellants. Pursuant to the terms of the concurrences mentioned, the southern lines, by appropriate tariffs, published the rates specified to become effective May 1, 1934, from Alabama and Tennessee origins, and on August 3, 1934, from Virginia origins.

Upon the request of the southern producers and the same southern railroads, however, the Commission, prior to the taking effect of the tariffs referred to, suspended the rates contained in those schedules for a period of six months, and entered upon an investigation of the rates in the proceeding designated as *Investigation and Suspension Docket No. 3985, Coke from Alabama and Tennessee to Central Territory.* A hearing was held before an examiner of the Commission, and on March 11, 1935, the Commission entered its report (208 I. C. C. 281) and order, in which it found that the rates published at the instance of these appellants, in order to bring about the establishment of the rate basis prescribed by it in Investigation and Suspension Docket No. 3511, had not been justified, and ordered the suspended schedules cancelled without prejudice to the filing of a new and lower level of rates which were set forth in an appendix to the report therein. (R. 32)

The appellants thereupon issued to their southern railroad connections a new set of limited concurrences providing for the publication of rates on coke from southern origins to destinations in central territory on the basis set out in the said appendix to the report of the Commission, and the southern lines accordingly published rates conforming to those concurrences to take effect May 2, 1936. However, the southern shippers and origi-

nating railroads again importuned the Commission to suspend the new tariffs, as a result of which those schedules were suspended by an order of the Commission, dated April 30, 1936, in its Investigation and Suspension Docket No. 4198. (R. 40) The Commission, however, did not suspend the concurrences issued by appellants in furtherance of the rate basis that had been prescribed by the Commission on March 11, 1935, in Investigation and Suspension Docket No. 3985. On the same date (April 30, 1936) and *without further hearing or notice to appellants,* the Commission entered a second report (215 I. C. C. 384) and order in the last-named proceedings, in which it prescribed an entirely different and still lower level of rates from southern points to central territory destinations than in either of the two preceding decisions involving those rates (R. 33), and requiring appellants and their connections to publish such lower rates on or before August 13, 1936.

For convenience, we have reproduced below a statement of the successively lower rate scales, in cents per ton, for application from the southern producing points to destinations in central territory required by the Commission in the three reports and accompanying orders above referred to:

DISTANCE	I&S 3511 (194 ICC 640) June 30, 1933	I&S 3985 * (208 ICC 281) March 11, 1935	I&S 3985 (215 ICC 384) April 30, 1936
	(Cents)	(Cents)	(Cents)
160 miles and over 140	230	230*	215
180 miles and over 160	245	240	225
200 miles and over 180	260	250	235
220 miles and over 200	270	260	245
240 miles and over 220	280	275	255
260 miles and over 240	290	285	265
280 miles and over 260	305	295	275
300 miles and over 280	315	305	285
320 miles and over 300	325	315	295
340 miles and over 320	335	325	305
360 miles and over 340	345	335	315
380 miles and over 360	360	350	325
400 miles and over 380	370	360	335
425 miles and over 400	380	370	345
450 miles and over 425	390	380	355
475 miles and over 450	400	390	365
500 miles and over 475	415	400	375
530 miles and over 500	425	410	385
560 miles and over 530	435	425	395
590 miles and over 560	445	435	405
620 miles and over 590	455	445	415
650 miles and over 620	470	455	425
680 miles and over 650	480	465	435
710 miles and over 680	490	475	445
740 miles and over 710	500	485	455
770 miles and over 740	510	500	465
800 miles and over 770	520	510	475
830 miles and over 800	530	520	485
860 miles and over 830	540	530	495
890 miles and over 860	550	540	505
920 miles and over 890	560	550	515
950 miles and over 920	570	560	525
980 miles and over 950	580	575	535
1,010 miles and over 980	590	585	545
1,050 miles and over 1,010	605	595	555

* The basis fixed here was made on a system of arbitraries for the hauls in the South and the amounts shown are based on an approximation of 7 per cent in excess of the basis required in 215 I. C. C. 384.

3. PROCEEDINGS IN THE LOWER COURT.

The bill of complaint herein was filed on July 22, 1936, the suit being started pursuant to the provisions of the Urgent Deficiencies Appropriations Act of October 22, 1913 (U. S. C. A. Title 28, Sec. 170; pp. 652, 653, 656). The bill (R. 1), after setting out the facts, alleged that the orders of the Commission, with respect to rates for the transportation of coke from southern producing

points to destinations in central territory, were arbitrary, unreasonable and wholly beyond the lawful powers of the Commission. Answers were filed by the United States (R. 129) and the Interstate Commerce Commission (R. 131). The southern railroads (R. 141), the Alabama Iron & Steel Shippers' Conference (R. 144), the Interlake Iron Corporation (R. 146), and the Citizens Gas & Coke Utility, and others (R. 155), were permitted to intervene. The answers filed by defendants generally alleged the validity of the Commission's orders.

The hearing in the lower court was held on October 15, 1936, and at that time the entire record made before the Commission, in its Docket I. & S. 3985, was introduced in evidence as Exhibits 4 (R. 201) and 5 (R. 417). During presentation of oral argument in behalf of these appellants, the lower court expressed the desire that briefs be filed (R. 565-567), but at the close of arguments on the same day and without having made any examination whatever of the record made before the Commission, the Court announced its decision that appellant's bill would be dismissed for want of equity. (R. 613)

On this appeal, all of the oral evidence taken in the proceedings before the Commission has been reduced to narrative form (R. 201 *et seq.*), under a stipulation of the parties that such narrative is a true and correct statement in narrative form of the oral testimony introduced in those proceedings and that it sets forth in condensed form all oral testimony offered on the trial of the case which is essential to the decision of the questions presented by the appeal. All of the exhibits offered in the proceedings before the Commission, and which were included as a part of Exhibit 4 in the lower court, have been certified to this court as original exhibits (R. 194) and are on deposit with the clerk.

4. PROCEEDINGS IN THIS COURT.

In accordance with Rule 12 of the Rules of Practice of this Court, a statement of the grounds upon which the jurisdiction of this Court is invoked was filed by appellants. On January 17, 1938, this Court entered an order finding that probable jurisdiction had been shown.

SPECIFICATION OF ERRORS.

Appellants make the following specification of errors:

(1) The lower court erred in finding that the evidence supports the findings of the Commission, and that in making its order dated April 30, 1936, in Investigation and Suspension Docket No. 3985, the Commission did not exceed its authority, and that said findings support the conclusions and its order of April 30, 1936, prescribing maximum reasonable rates for the transportation in question.

(2) The lower court erred in finding that the Commission's conclusion that the rates prescribed in the order of April 30, 1936, for future application will be maximum reasonable rates, is supported by evidence.

(3) The lower court erred in finding that the Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers is supported by the evidence.

(4) The lower court erred in finding that the Commission properly gave consideration to the effect of rates upon the movement of traffic.

(5) The lower court erred in finding that the Commission's conclusion, without hearing or notice, that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application

from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, distance considered, than the rates applying in either territory through which said interterritorial traffic passed.

(6) The lower court erred in finding that the Commission's order of April 30, 1936, in Investigation and Suspension Docket No. 3985 is valid.

(7) The lower court erred in finding that it was not required to pass upon the validity of the Commission's order of March 11, 1935.

(8) The lower court erred in finding that the order of April 30, 1936, in Investigation and Suspension Docket No. 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.

(9) The lower court erred in finding that the bill of complaint herein should be dismissed for want of equity at plaintiffs' costs.

(10) The lower court erred in failing to find, as it should have done, that the orders of the Commission in Investigation and Suspension Docket No. 3985, dated March 11, 1935 and April 30, 1936, and the order in Investigation and Suspension Docket No. 4198, dated April 30, 1936, are arbitrary and unjust, are contrary to the evidence of record and without support of any substantial evidence properly before the said Commission in the proceedings in which they were made, and that said findings are against the indisputable character of, and the manifest weight of, the evidence.

(11) The lower court erred in failing to find, as it should have done, that the said orders of the Commission prescribe and require plaintiffs to maintain rates which

are less than reasonable maximum rates, and that the action of the Commission in making them was therefore arbitrary, unjust and without lawful authority.

(12) The lower court erred in failing to find, as it should have done, that the said orders of the Commission prescribe and order plaintiffs to publish and maintain rates which result in the undue preference of manufacturers and shippers located in the South and undue prejudice of the manufacturers and shippers located in the North, which these carriers by the provisions of Section 3 of the Interstate Commerce Act are forbidden to publish and maintain.

(13) The lower court erred in failing to find, as it should have done, that the said orders of the Commission arbitrarily required reductions in rates that had been published and made effective in purported compliance with the Commission's decision in Investigation and Suspension Docket No. 3511, notwithstanding that those rates were clearly not involved in Investigation and Suspension Docket No. 3985.

(14) The lower court erred in failing to find, as it should have done, that there has been no understanding or agreement between the central territory lines, on the one hand, and the southern carriers, on the other, as to the divisions to be received by either or both of them out of the rates fixed by the Commission in Investigation and Suspension Docket No. 3985.

(15) The lower court erred in failing to find, as it should have done, that the Commission's order of April 30, 1936, which prescribed and required petitioners to publish and maintain and charge the third successively lower basis of rates without having taken or heard any evidence or facts but made solely on petitions or pleadings, was arbitrary and unlawful and denied petitioners the hearing provided for by law.

(16) The lower court erred in failing to find, as it should have done, that the said orders of the Commission were not supported by basic findings that the rates prescribed were reasonable maxima.

(17) The lower court erred in failing to find, as it should have done, that the Commission is without lawful power or authority to compel petitioners to join the southern carriers in rates made lower than reasonable maxima, in order to enable southern producers of coke better to compete with producers in the North.

(18) The lower court erred in failing to find, as it should have done, that the said order of the Commission requiring petitioners to charge shippers in the North reasonable maximum rates and compelling petitioners to join the southern carriers in rates from the South to the North less than reasonable maxima, would require petitioners to engage in a prejudicial and preferential practice in violation of law.

(19) The lower court erred in failing to find, as it should have done, that the said orders of the Commission were beyond its lawful powers in that the rates therein prescribed were based on competitive conditions between shippers and railroads in the South on the one hand and shippers and railroads in the North on the other hand, and in utter disregard of transportation conditions.

(20) The lower court erred in failing to find, as it should have done, that transportation conditions applicable in connection with joint through rates on coke from the South to the North are more onerous than apply within the North, and that reasonable maximum rates on coke from the South to the North therefore must be higher than are applicable within the North.

(21) The lower court erred in failing to find, as it should have done, that the Commission arbitrarily dis-

regarded and rejected certain well-known and long-recognized standards for testing and prescribing reasonable maximum rates, and in fact tested and fixed the rates on coke from the South to the North by a standard or a basis contrary to those usually employed.

(22) The lower court erred in failing to find, as it should have done, that the Commission fixed rates on coke from the South to the North for the purpose of equalizing disadvantages of geographical location, opportunities or abilities, which is beyond the lawful powers of the Commission to do.

(23) The lower court erred in failing to find, as it should have done, that there was no substantial evidence before the Commission to support its conclusion that the prescribed rates are reasonable maximum rates.

(24) The lower court erred in failing to find, as it should have done, that the indisputable character of the evidence before the Commission establishes that rates fixed and ordered are less than reasonable maximum rates.

(25) The lower court erred in failing to find, as it should have done, that the rates applicable to the transportation of coke in the North are subnormal rates, as are the rates voluntarily maintained by the southern carriers within the South, and neither basis affords a lawful or proper criterion for fixing maximum reasonable rates from the South to the North.

(26) The lower court erred in failing to find, as it should have done, that there was no evidence to support the erroneous assumption by the Commission that the share of the petitioners out of the joint through rates prescribed would be equivalent to the earnings they would receive for the transportation of coke within their own territory for like distances at the same level of rates.

(27) The lower court erred in failing to find, as it should have done, that the action of the Commission in suspending in its Investigation and Suspension Docket No. 4198 the tariffs naming rates on coke from southern manufacturing points to destinations in central territory and not the concurrences of central territory carriers providing for rates on the maximum reasonable basis previously prescribed by the Commission created a conflict between tariffs and concurrences which deprived petitioners of their right to reasonable compensation based on the reasonable and remunerative joint through rates so prescribed by the Commission for which concurrences were in effect.

(28) The lower court erred in failing to issue the injunction prayed for in the petition herein.

SUMMARY OF ARGUMENT.

I.

The orders of the Commission requiring appellants to make drastic reductions in the level of joint through interterritorial coke rates generally from southern manufacturing points to destinations in Ohio, Michigan, Indiana and Illinois, were issued without a hearing, without notice to appellants, and without evidence, in violation of Section 15 (1) of the Interstate Commerce Act and the appellants' constitutional rights.

II.

The orders of the Commission requiring coke rate reductions are contrary to the manifest weight of the evidence and the indisputable character of the evidence. The southern interests conceded that transportation conditions warrant a higher level of rates interterritorially than applies between points in central territory. They do not contend and did not purport to show by their evidence that the rates contended for by appellants exceeded reasonable maxima. In the oral arguments presented by southern interests to the Commission, no one contended that those rates were unreasonably high, but their evidence and contentions were directly solely to the issue of undue prejudice and preference. The interterritorial coke rates from the South are materially lower than coke rates fixed by the Commission in other cases for application on lines of appellants and other railroads between points in the North.

III.

The orders of the Commission are void because not supported by substantial evidence. The record in this

case contains no evidence of probative value tending to prove unreasonableness in the rates on coke from the South to central territory destinations.

IV.

The Commission, in making its reduced rate orders involved herein, simply required appellants to join in the central territory basis of rates, and utterly disregarded the standards ordinarily employed in the determination of reasonableness or unreasonableness of rates.

V.

The orders of the Commission are not supported by necessary findings. There are no adequate or proper findings in the Commission's reports on which its orders herein could be said to have been based.

VI.

The orders of the Commission are void because they attempt to equalize geographical disadvantages, fortune and opportunities. The reports of the Commission plainly manifest a purpose and determination on the part of the Commission to set interterritorial rates from the South to central territory at the level prevailing in the latter territory, in utter disregard of the more unfavorable transportation conditions obtaining on such traffic, for the sole purpose of improving the marketability of southern coke in northern consuming areas.

VII.

Even if the Commission's orders rest only in part upon the exertion of a power not granted to the Commission by Congress, its orders are void.

ARGUMENT.

I.

THE ORDERS OF THE COMMISSION REQUIRING APPELLANTS TO REDUCE THE RATES ON COKE FROM SOUTHERN MANUFACTURING POINTS TO DESTINATIONS IN OHIO, MICHIGAN, INDIANA AND ILLINOIS WERE MADE WITHOUT NOTICE AND HEARING IN VIOLATION OF APPELLANTS' RIGHTS UNDER THE CONSTITUTION AND UNDER THE INTERSTATE COMMERCE ACT.

The bases of coke rates to be charged from southern origins to central territory, as well as within the latter, were fixed by the Commission after extended hearings and on a comprehensive record in I. & S. Docket 3511. (R. 42, *et seq.*) These appellants in good faith complied with that decision and orders entered in connection with it by promptly revising coke rates between points in central territory to the basis prescribed. At the same time they requested their southern railroad connections to take like action in respect of joint rates from southern producing points to central territory destinations. These requests were disregarded by the southern lines, which went no further than to make reductions in the joint rates in instances where they were higher than the basis prescribed by the Commission.

It accordingly became necessary for appellants to issue, under rules and regulations laid down by the Commission, new concurrences limiting their participation in joint through coke rates from the South to rates on the basis fixed by the Commission. This action of appellants forced the publication of tariffs containing the 3511 rates, but on the request of southern railroads and shippers those schedules were suspended in I. & S. Docket No. 3985. A hearing in the matter of the sus-

pended tariffs was held before an Examiner for the Commission, at which time the southern interests sought by their evidence to enlarge the scope of the proceeding by including rates which were then in effect on the I. & S. 3511 basis. Upon objection by these appellants that such other rates were not involved in the case, the Examiner stated (R. 226):

> "Irrespective of what the exhibit shows, the issues of course are limited to the schedules under suspension."

and counsel for the southern lines, who was examining the witness added (R. 226):

> "The proposal is limited to the points involved."

And again at page 228 of the record, the following colloquy appears:

> "Examiner McGrath: The essential or basic issues here are the lawfulness of the proposed rates, isn't that correct?
>
> Mr. Day: That is right, the suspended rates.
>
> Mr. Clark: The suspended rates.
>
> Examiner McGrath: Yes, the suspended rates."

This general understanding and agreement of the parties as to the scope of the issues and the rates involved is likewise indicated elsewhere in the record. (R. 230, 231, 232, 235) The report and order of the Commission, following the hearing in those suspension proceedings, found the suspended rates not justified, and required that the schedules be canceled, without prejudice to the filing of rates on a basis suggested by the Commission. To the extent that the question of notice and hearing is concerned, this order was unquestionably within the right and power of the Commission. But on April 30, 1936, without any hearing beyond that just mentioned, and without its jurisdiction to pass on other rates having been invoked, the Commission entered an order requiring reductions in every coke rate from the southern man-

ufacturing points to every destination in central territory. This order was entered in this same proceeding—I. & S. Docket No. 3985—the issues in which were limited strictly by the order of investigation (and by the understanding of the parties at the hearing) to the lawfulness of the rates under suspension therein, rates applying to only a limited number of points in central territory. In this order of April 30th the Commission recited that on April 15, 1936, it had "reopened the proceeding for further consideration on the present record * * *," *i.e.*, the record made in response to the limited issue raised by the order of investigation, the record upon which the parties and the Commission's examiner announced their understanding and agreement that only this limited issue was involved.

The constitutional guaranty of due process of law requires notice and hearing as a condition to the validity of an order such as that entered here. *C. M. St. P. & P. R. Co.* v. *Minnesota,* 134 U. S. 418; *Southern R. Co.* v. *Virginia ex rel. Shirley,* 290 U. S. 190. Complementary to this constitutional right are the provisions of the Interstate Commerce Act. Thus, the portion of the Act dealing with the suspension of tariffs (Section 15(7)) provides:

> "Whenever there shall be filed with the Commission any schedule stating a new * * * rate, * * * the commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate * * * and after full hearing, * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective * * *."

Similarly, the section of the Act which gives the Commission its power to prescribe rates, Section 15(1), provides:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate * * * demanded, charged, or collected * * * is or will be unjust or unreasonable or unjustly discriminatory * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *."

In *Interstate Commerce Commission* v. *L. & N. R. Co.*, 227 U. S. 88, replying to the claim that a Commission's order made without substantial supporting evidence was conclusive, this court declared (p. 91):

> "A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.
>
> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair, if the finding was contrary to the 'indisputable character of the evidence.'"

And again at page 91:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with facts proved."

In *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, this court stated (p. 262):

> "* * * But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under sections 1(5), 3(1) and 15(1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 669. The legal standards governing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, *a fair hearing is a fundamental requirement. Interstate Commerce Commission* v. *L. & N. R. R. Co.,* 227 U. S. 88, 91. * * *" (Italics ours.)

In the *New England Divisions Case* (*Akron, C. & Y. Ry. Co.* v. *United States,* 261 U. S. 183), this court said (at p. 200):

> "A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

In the proceeding out of which the orders here sought to be enjoined issued, the "step asked to be taken" was that the Commission condemn as unlawful the tariffs under suspension. There was no issue with regard to rates to any points other than those named in the sus-

pended schedules, and there was no issue with regard to the prescription of any rates by the Commission to any points, in the event that the Commission found the rates in the suspended schedules to be unlawful. At the hearing in the lower court it was suggested that appellants were put on notice that the Commission might go beyond the issues raised by the order of investigation, and as understood at the hearing, by the petitions filed by the southern interests in opposition to the first order entered by the Commission in this docket, namely, the order of March 11, 1935. These petitions appear at pages 512 and 538 of the record. Not only do they fail to ask the Commission to prescribe any rates or deal with rates to any points not involved in the suspended schedules but, indeed, even if they did, they could not cure the defect of which complaint is here made since they would have dealt with matters of which notice was not given at the time of the hearing. The Commission's order of April 30, 1936, therefore, transgressed appellants' right to notice and hearing in two respects: (1) In condemning rates to points not involved in the suspended schedules and in requiring that they be reduced, and (2) in affirmatively prescribing for future application rates to any points, including those involved in the suspended schedules. It is respectfully submitted that for these reasons the order of April 30, 1936, contravenes the requirements of due process of law and the statutory provisions granting appellants the right to a full hearing, and that it should therefore be set aside.

II.

THE ORDERS OF THE COMMISSION REDUCING COKE RATES FROM THE SOUTH ARE CONTRARY TO THE MANIFEST WEIGHT AND THE INDISPUTABLE CHARACTER OF THE EVIDENCE.

In the proceedings before the lower court, counsel for the southern producers contended that the court was

without jurisdiction to set aside orders of the Commission even though such orders were against the manifest weight of the evidence. We believe, however, that appellants' charge that the order is against the weight of the evidence and the indisputable character of the evidence finds legal support in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91; *Louisville & Nashville R. R. Co.* v. *United States*, 246 U. S. 246, and many other decisions of this Court.

It is well to bear in mind at the outset that the interterritorial coke rates contended for by these appellants are none other than those which the Commission itself had prescribed a short time previously in the I. & S. Docket 3511 proceedings after extended hearings and the consideration of an enormous amount of testimony and documentary evidence as well as contentions and arguments of railroad and shipping interests, both north and south. Efforts subsequently made by southern shippers and railroads, through petitions to the Commission for rehearing and reconsideration, to secure modification of those prescribed rates were unavailing.

We have previously explained how the southern railroads, contrary to the expressed intention of the Commission and the action taken by appellants in respect of the coke rates within central territory and the practice usually followed in such cases, refused to publish on appellants' request the interterritorial (scale 3) basis prescribed by the Commission, but instead continued in effect certain rates which were lower than the scale, while at the same time reducing to the scale basis the great body of interterritorial rates which up to that time had, generally speaking, been maintained on a much higher level. This made it necessary, in the interest of giving complete effect to the decision and orders in I. & S. Docket 3511 proceedings, for appellants to issue limited concurrences to the southern originating lines, which had

for their object the uniform establishment of the interterritorial scale from southern coke manufacturing points to central territory, just as the maximum reasonable level of rates contemporaneously prescribed for application within that territory was being generally observed therein by these appellants.

Schedules naming rates on the I. & S. 3511 basis to those destinations in central territory where the rates were lower than the prescribed level were published pursuant to those concurrences but, at the request of southern shippers and railroads, were suspended by the Commission. This resulted in the continuation of lower rates between certain points than between others, as well as numerous violations of the long and short haul provision of Section 4 of the Act. After a hearing and argument by both sides the Commission prescribed in its order in I. & S. Docket 3985, dated March 11, 1935 (R. 32-33), an entirely new and lower scale of rates for interterritorial application and in its said order (R. 33) provided as follows:

> "It is further ordered, that the orders heretofore entered in *Investigation and Suspension Docket 3511, Coke between Points in Central and Illinois Territories,* reported in 194 I. C. C. 641, and the complaint No. 22052, *Alabama By-Products Corp., et al.* v. *Louisville & Nashville Railroad Company, et al.,* consolidated with and disposed of in the report immediately before referred to, be, to the extent that they require establishment and maintenance of rates on coke, in carloads, from origins in Alabama to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan, which are higher than those approved in the report made part hereof for application from and to the same points, and they are hereby, vacated and set aside."

Thereafter, and without any further hearing or notice to appellants, the Commission in the same suspen-

sion proceedings (I. & S. 3985) made a report (R. 33) and order (R. 39) dated April 30, 1936, requiring further drastic reductions not only in the suspended rates but in all coke rates from southern points to central territory destinations.

The Commission's action in arbitrarily requiring reductions in rates not involved in the proceedings before it and without evidence is discussed under a separate heading. The point here is that the Commission's orders, even to the extent that they relate to rates covered by the I. & S. 3985 proceedings, were against the manifest weight and the indisputable character of the evidence. The reasons assigned by appellants in support of this ground of their appeal are:

(*a*) The basis of interterritorial coke rates contended for by appellants was that fixed by the Interstate Commerce Commission on a comprehensive record and at the same time as the basis applying within central territory was prescribed by the Commission.

(*b*) The abundant and uncontroverted evidence offered by central territory railroads and shippers before the Commission to prove that the I. & S. Docket 3511 basis they are contending for was not unreasonably high but actually lower than it might properly be. (R. 204, 338, 368, 390, 394)

(*c*) Coke rates of appellants and other railroads, prescribed by the Commission for application on their lines between points in the North (*Standard Gas Equipment Corp.* v. *Lehigh Valley R. Co.*, 160 I. C. C. 4; *Hudson Valley Coke & Products Co.* v. *N. Y. N. H. & H. R. R. Co.*, 129 I. C. C. 472; *Coke Producers Association of Connellsville* v. *B. & O. R. R. Co.*, 27 I. C. C. 125, and other cases) were shown to be materially higher than any of the three reduced coke rate scales ordered to be established from the South to destinations in central territory. (R. 52-53)

(*d*) Admissions of witnesses for the southern interests that the I. & S. 3511 rates were not in excess of reasonable maxima. (R. 244, 245, 279, 289, 335-6)

(*e*) At the oral argument before the Commission not a single advocate out of the four appearing for the southern shippers and railroads contended that the I. & S. Docket 3511 interterritorial rates were unreasonably high. (Exhibit 5, R. 414) The arguments of Mr. Gwathmey (R. 449) and Mr. Mohr (R. 456) for the southern railroads and Mr. Norman (R. 472) and Mr. Widell (R. 487) for southern coke shippers are set out on the indicated pages of the record.

(*f*) The petitions for modification of the Commission's order, filed by the southern shippers (R. 512-548) made no contention that the rates prescribed by the Commission were unreasonable, but on the contrary, in their "requested specific findings" therein, those interests expressly concede (R. 514, par. 2) that the evidence before the Commission did not warrant a finding that the rates required by the final order of the Commission were as high as reasonable maxima, and went on to say that higher rates should be established only if southern railroads elected to maintain the higher rates. (R. 514, pars. 3-4)

III.

THE ORDERS OF THE COMMISSION ARE VOID BECAUSE THEY ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

Without reference to the large body of rates not involved in the proceedings before it, which were required to be reduced along with those that had been under suspension and ordered cancelled by the first report and order of the Commission in I. & S. Docket 3985, and confining discussion under the present caption to the rates in issue in that case, appellants submit that there

was no evidence of a substantial nature, which tended even remotely to prove that the assailed rates were in excess of maximum reasonableness. In order to save further argument on the question, it is perhaps well to state here that appellants are not asking this Court to weigh the evidence, to inquire into the soundness of the reasoning by which its conclusions were reached, nor to substitute its judgment for that of the Commission, for appellants well understand that the courts will not undertake to deal with such matters. It is, however, well settled by the decisions of this Court that an order of the Commission, which is unsupported by evidence, is clearly invalid. *Interstate Commerce Commission* v. *U. P. R. R. Co.*, 222 U. S. 541; *Interstate Commerce Commission* v. *L. & N. R. R. Co.*, 227 U. S. 88, 91, 92; *New England Divisions Case*, 261 U. S. 184, 203.

In *Florida East Coast Line* v. *United States*, 234 U. S. 167, at page 185, the court said:

> "While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding and may not be reexamined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involved not an issue of fact, but one of law which it is the duty of the courts to examine and decide. (*Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227, U. S. 88, 91, 92, and cases cited.)

Statements made by representatives of southern railroads and shippers at the hearing, on oral argument, and in their petitions for modification of the Commission's first decision and order indicate those interests had no intention of attacking as unreasonable *per se* the basis of interterritorial rates prescribed by the Commission in I & S Docket 3511 and contended for by ap-

pellants. According to the witnesses for the southern producers their position was (R. 367)

> "that the suspended rates, if approved, would establish undue or unlawful prejudice against us to this territory. Our reasons for that contention is that the grade of the Column 2 scale itself is sufficiently high to justify its application from Birmingham."

We have previously adverted to testimony of southern rate experts in which it was conceded that interterritorial rates from the South should properly be higher than those applying within the North. What then are the facts from which the Commission was persuaded to condemn as unreasonable in two successive decisions the basis of rates to which it had previously, in I. & S. Docket 3511, required the interterritorial rates to be reduced? We have carefully canvassed the record and are unable to find any evidence of probative value upon which the Commission's decision and orders could be said to have been based. The second decision in I & S. 3985 makes no reference to any supporting evidence, even in respect of the rates that had been cancelled after suspension, as a result of its first report and order in that case. The decision itself indicates (R. 35) that commercial, and not traffic or transportation, conditions led the Commission to order a wholesale reduction in coke rates from the South, for it was there stated:

> "The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect."

Such evidence, as is described in the foregoing excerpt from the Commission's findings, might conceivably justify a finding of prejudice or preference under Section 3 of the Act, but it is difficult to see how it could have any weight in appraising the intrinsic reasonableness or unreasonableness of rates.

In the various cases which have come before this Court, involving the question of insufficiency of evidence to sustain reduced rate orders of the Commission, reference will usually be found to evidence of comparisons of rates on the same or similar commodities, between points in the same general territories, and where operating conditions are substantially similar. *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 666; *State of Ohio* v. *United States,* 292 U. S. 498, 505; *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490, 500. See also *Mississippi Railroad Commission* v. *A. & V. Ry. Co.,* 89 I. C. C. 47, at page 61. As appellants have already explained, there was no claim or contention by the southern coke manufacturers or railroads that the I. & S. 3511 basis of interterritorial rates were higher than reasonable maxima, and hence their testimony and exhibits went rather to the question of the ability of southern coke shippers to sell in central territory as much coke tonnage as they thought they should. Some comparisons were made with rates and earnings on extremely light loading and wholly incomparable commodities, such as charcoal, limestone, etc., but the witnesses offering them made it plain by their testimony that traffic density and other conditions warrant higher interterritorial rates than apply within central territory, and that the comparisons referred to were offered to show that the central territory basis would not be too low to apply interterritorially, in other words, would not be lower presumably than minimum reasonable rates. Whatever finding the Commission

might have made, or conclusions it might have reached, with respect to the probative value of such evidence to support findings of minimum reasonableness, if that question had been the issue before it, the Commission's reports make no reference to them and it is fair to say that they were appraised as having no probative worth in determining maximum reasonable interterritorial rates. Appellants submit that there is no evidence of a substantial character, tending to prove that the basis of rates fixed by the Commission itself in I. & S. Docket 3511 exceeded reasonable maxima at the time its orders in I. & S. Docket 3985 were made.

In the dissenting opinion of Commissioner Meyer (which was joined in by Chairman Mahaffie and Commissioners Porter and Miller) to the second report of the Commission in I. & S. Docket 3985, it was said (R. 37-38):

> "The basis of rates now established herein as reasonable is the third successively lower basis of rates prescribed in this proceeding within the past three years. As I understand the case, the sole purpose of now requiring a further reduction is to enable southern producers and carriers to better compete with the producers and carriers in the North in the sale and movement of coke to destinations in the North. While the rates now prescribed are termed maximum reasonable rates, as were those twice previously prescribed, they are in fact compelled subnormal competitive rates.
>
> Instead of testing the rates by the standards ordinarily employed, they are here tested solely by the level of the rates applicable within the North and the expressed desires of the southern producers and carriers for the same level of rates from the South to the North for competitive reasons. The logic of the report is that if the northern carriers should later voluntarily reduce the level of their rates within the North, such reduced level would

then be prescribed as the maximum reasonable basis from the South to the North if the southern producers and carriers so desired.

The right of carriers to voluntarily reduce their rates to meet competition is recognized. The southern lines are free to exercise this right by reducing their rates to the border of the two territories. I do not recognize a right in this Commission to require the northern lines to join in less than maximum reasonable rates for the sole purpose of enabling southern lines to better meet northern competition.

I am authorized to state that Chairman Mahaffie and Commissioners Porter and Miller join in this dissent."

The District Court was seemingly impressed by the fact that rates within the South were in some instances at a lower level than those which the Commission in I. & S. 3511 had prescribed for application within central territory. The record indicates, however, that coke rates between southern points are on no fixed or regular basis, and they have never been passed upon by the Commission. Witnesses for the southern interests say that they were originally made for competitive reasons the same as, or lower than, the rates on coal (R. 328, 274), that the coal rates in the South are highly competitive (R. 269), and that the matter of revising coke rates in the South has been under consideration for some time. (R. 273, 329)

In referring to the coke rates prevailing between points in the South, the Commission said at page 677 of its decision in I. & S. Docket 3511 (R. 87):

"The fact that the present untreated coke-rate structure in the South is lower than in central territory has no special significance in the determination of maximum reasonable interterritorial rates. The southern carriers indicated their intention to

revise these rates, which are lower in many instances than rates approved by us on coal. In our opinion, the scale shown in appendix 8, column 3, will provide maximum reasonable and non-prejudicial coke rates from the southern origins in issue to central territory."

To demonstrate the unreliability and impropriety of using such rates as the excuse for depressing the normal interterritorial level to central territory, we call attention to the following typical illustrations of southern rates drawn from exhibits of the southern lines, using for examples points falling within the 400-mile to 425-mile zone in the three reduced coke rate scales promulgated by the Commission for interterritorial application:

I. & S. 3511 (194 I. C. C. 640)	380 cents
I. & S. 3985 (208 I. C. C. 281)	370 "
I. & S. 3985 (215 I. C. C. 384)	345 "
Birmingham to Charlotte, N. C.	360 "
Chattanooga to High Point, N. C.	372 "
Birmingham to Orangeburg, S. C.	338 "
Chattanooga to Savannah, Ga.	*349 "
Birmingham to Baton Rouge, La.	327 "
Chattanooga to Tallahassee, Fla.	344 "
Birmingham to Lakeland, Ky.	293 "

Rates on a level higher than those instanced for shorter distances could be cited, and conversely, lower rates for greater mileages, but those mentioned will suffice to show the chaotic and anomalous condition of the southern rates, which the Commission, in its first decisions fixing interterritorial rates, properly held have "no special significance in the determination of maximum reasonable interterritorial rates."

It is well settled by decisions of this Court that these depressed coke rates in the South, which were estab-

* Behring Exhibit 3 shows 349 cents, Burke Exhibit 9 shows 339 cents.

lished and have since been maintained for competitive reasons, furnish no lawful standard by which to determine the reasonableness of other rates. Thus, in *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 99, it was said:

> "When first put in force they (the rates) were abnormally low because compelled by water competition, and therefore furnish no just standard of reasonableness."

and again, in *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1, 13, this Court said:

> "Of course, competition by rail as well as by water may compel such a reduction in rates as altogether to destroy their value for purposes of comparison."

In *Texas & Pacific Ry Co.* v. *United States*, 289 U. S. 627, 636, the Court said:

> "As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Comm'n* v. *Alabama Midland Ry. Co.*, 74 Fed. 715, 723-4; 168 I. C. C. 144, 172-3; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 564; *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 522.
>
> The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination; *Texas & Pacific Ry. Co.* v. *Interstate Commerce Comm'n*, 162 I. C. C. 195."

but there is no provision of the statute which compels railroads, as involuntary partners in joint rates with lines in another part of the country, to concur in the establishment of less than maximum reasonable rates for no other reason than to improve the opportunity of

southern coke manufacturers to dispose of their products in the North.

In *Export and Import Rates To and From Southern Ports,* 205 I. C. C. 511, the Commission said (p. 554):

> "Our power to require the establishment and maintenance of joint rates is, in the absence of undue prejudice, limited to the requirement that maximum reasonable rates be established and maintained."

IV.

THE ORDERS OF THE COMMISSION ARE VOID BECAUSE BY THEM THE COMMISSION ATTEMPTS TO EQUALIZE GEOGRAPHICAL AND TRANSPORTATION DISADVANTAGES, FORTUNE, OPPORTUNITIES OR ABILITIES.

The reports of the Commission in I. & S. Docket 3511 (R. 42, *et seq.*) and in I. & S. Docket 3985 (R. 15, *et seq.* and 33, *et seq.*) evince clearly a desire on the part of the Commission to prescribe a basis of rates on coke from the South to central territory that will permit the southern manufacturers to market their product in that area, or as is stated in the opinion of the four dissenting Commissioners (R. 38):

> "the sole purpose of now requiring a further reduction is to enable southern producers and carriers to better compete with the producers and carriers in the North in the sale and movement of coke to destinations in the North. While the rates now prescribed are termed maximum reasonable rates, as were those twice previously prescribed, they are in fact compelled subnormal competitive rates."

In disregarding the geographical and transportation disadvantages of the southern coke producers, in order to place them on an equality with coke manufacturers in a territory where traffic and transportation conditions are more favorable, thereby denying to the

latter the benefits of their geographical location, the Commission went far beyond any powers conferred on it by the statute.

In *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, this Court said at pages 637-638 of its opinion:

> "While the carriers may, therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel. *Southern Pac. Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 433, 444; *Interstate Commerce Comm'n* v. *Diffenbaugh,* 222 U. S. 42, 46; *Ellis* v. *Interstate Commerce Comm'n,* 237 U. S. 434, 445; *United States* v. *Illinois Central R. Co.,* 263 U. S. 515, 524; *Atchison, T. & S. F. Ry.* v. *Interstate Commerce Comm'n,* 190 Fed. 591; *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462, 471."

The principle that the reasonableness of rates is to be determined by considerations of the service performed under them rather by extrinsic circumstances, finds full expression in the decision in *Southern Pacific Company* v. *I. C. C., supra* (219 U. S. 433). In that case the Commission had condemned as unreasonable a rate of $5.00 per ton on lumber from the Willamette Valley to San Francisco and, by its order, restored the rate of $3.10 per ton which, by voluntary action of the carriers, had been in effect for many years prior to the publication of the $5.00 rate. The $3.10 rate was originally established to enable shipments from the Willamette Valley

to compete with lumber shipped by water from points on the Columbia River and Puget Sound. In summarizing the contentions upon which the suit rested, this Court said at page 441:

> "It was alleged that the Commission, in setting aside the increased tariff rate of $5. and fixing substantially the old rate, had exceeded the powers conferred upon it by law, because it did not act in the exercise of the authority conferred upon it to determine whether a rate was just and reasonable in and of itself with regard to the service rendered, but had proceeded upon the assumption that the power was conferred upon it to fix an unreasonable rate because of its belief as to the equities of the situation or upon the basis of principles of estoppel or upon its conception of public policy and its right to enforce what was deemed best, under the circumstances, for the interest of shippers."
>
> * * *
>
> "In the argument at bar, the railroad companies do not question that if a complaint is made to the Interstate Commerce Commission concerning the unreasonableness of a rate, that body has the authority to examine the subject, and, if it finds the rate complained of is, in and of itself, unreasonable, having regard to the service rendered, to order the desisting from charging such rate, and to fix a new and reasonable rate, to be operative for a period of two years. The companies further do not deny that where the Commission exercises such authority, its finding is not subject to be reviewed by the courts. *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155. In other words, the argument on behalf of the railroads fully concedes that an order of the Commission is not open to attack in the courts so long as that body has kept within the powers conferred by the statute. Making these concessions, the proposition relied upon to secure re-

versal is that the court below should have set aside the order of the Commission because that order was in excess of the power conferred upon the Commission; and this, it is insisted, is to be determined by substance, and not mere form. In other words, the contention is, that although the order made by the Commission may have been couched in a form which would cause it, superficially considered, to appear to be but the exercise of an authority to correct an unreasonable rate, yet if it plainly results from the record that the order of the Commission was not the exercise of such an authority, but was based upon the assumption by that body of the possession of a power not conferred by law the mere form given by the Commission to its action does not relieve the courts from the duty of reviewing and correcting an abuse of power. Applying these propositions, the insistence is that, both in form and in substance, the order of the Commission is void, because it manifests that that body did not merely exert the power conferred by law to correct an unjust and unreasonable rate, but that it made the order which is complained of upon the theory that the power was possessed to set aside a just and reasonable rate lawfully fixed by a railroad whenever the Commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. That is to say, the contention is that the order entered by the Commission shows on its face that that body assumed that it had power not merely to prevent the charging of unjust and unreasonable rates, but also to regulate and control the general policy of the owners of railroads as to fixing rates, and consequently that there was authority to substitute for a just and reasonable rate one which, in and of itself, in a legal sense, might be unjust and unreasonable, if the Commission was satisfied that it was a wise policy to do so, or because a railroad had so conducted itself as to be estopped in the future from being entitled to receive a just and reasonable compensation for the service rendered."

The Court's finding was that the Commission exceeded its powers. It said (p. 444):

> "* * * we are of opinion that the court below erred in not restraining the enforcement of the order complained of, because we see no escape from the conclusion that the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies insist the order plainly manifests."

And at 449:

> "While it is true that the opinion of the Commission may contain some sentences which, when seggregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered, as a whole, in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right under the law, to protect the lumber interests of the Willamette valley from the consequences which it was deemed would arise from a change of the rate, even if that change was from an unreasonably low rate, which had prevailed for some time to a just and reasonable charge for the service rendered for the future. Manifestly, this was deemed by the Commission to be the power which was being exerted, since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary."

It is submitted that since, as this Court held in the *Southern Pacific case,* the Commission is without power to compel railroads to maintain a low rate for the purpose of enabling shippers in one territory to meet the

competition of shippers who had the benefit of cheap water transportation, the Commission is without power to compel the central territory carriers, who maintain a uniform and reasonable maximum basis of rates between points in the territory they serve, to join with another set of railroads in a depressed and unreasonably low basis of rates from the South.

Another case in which the order of the Commission was stricken down because, in making it, the Commission exceeded its power by making competition control (this time the competition of foreign sellers) was *Atchison, Topeka & Santa Fe Ry. Co.* v. *Interstate Commerce Commission,* 190 Fed. 591 (1911), affirmed 231 U. S. 736. In that case an injunction was granted by the Commerce Court against the Commission's order reducing the all-rail rates on lemons from California to the east for the reason that the Commission had acted under a mistake of law and without the scope of its delegated authority in taking competition into consideration in fixing the all-rail rates. The Court said at page 592:

> "The first and decisive ground of attack is that the order 'is without the scope of the delegated authority under which it purports to have been made' (*I. C. C.* v. *Ill. Cent. R. R. Co.,* 215 U. S. 452, 470, 30 Sup. Ct. 155, 54 L. Ed. 280), in this: that, while in form holding the $1.15 rate unreasonable and prescribing the $1 rate as reasonable, in substance the Commission did not determine the intrinsic reasonableness of either rate, but reduced the rate prescribed by the railroads in order that, and to a point at which, in its judgment, the California growers might successfully compete with their Sicilian competitors in a broader market than would otherwise be possible; in other words, that the Commission acted upon the erroneous assumption that it had the power and the right, if not the duty, so to adjust railroad rates as would give to the American industry protection against foreign competition."

And again at pages 594-595:

> "The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely.
>
> An examination of the report of the Commission, reproduced so far as it bears on the lemon rate, in its entirety, demonstrates that except for two brief paragraphs suggesting grounds for lowering the lemon while maintaining the orange rate, it deals entirely with matters tending to show the need in this industry of a high-protective tariff against Sicily and, not on traffic considerations, but to compensate for the tariff insufficiencies, a low transportation rate especially to eastern territory."

The principle was again set forth in *Idaho Power Co.* v. *Thompson,* 19 Fed. (2d) 547, (District Court Idaho, three judges; 1927) where the Court said (580):

> "The Legislature has declared that rates shall be reasonable, just and non-discriminative, and has clothed the Commission with full power to see that such policy is carried into effect. In determining whether a schedule conforms to these requirements, it must act upon the facts and be governed by considerations intrinsic to the service, and cannot act out of respect for public policies however wise they

> may seem to be, which the legislature has not prescribed. As in substance was said in *Southern Pacific Co.* v. *I. C. C.*, 219 U. S., 433, 31 Sup. Ct. 288, 55 L. Ed. 283, it is without authority to disapprove a rate intrinsically just and reasonable, and substitute another which in itself is, in a legal sense, unjust and unreasonable, merely because it would be a wise policy to do so, or because a utility has so conducted itself as to be estopped from being entitled to a reasonable compensation."

In appellants' view, it seems clear that the Commission's attempt to require them to join in rates for the purpose of placing southern manufacturers and railroads in a better position to meet competition constitutes the entire basis of its orders. But even though it be concluded that the orders, to the extent that they might refer to rates properly before the Commission, are based on matters in addition to the attempt to require reductions for the purpose of meeting competition, it is respectfully submitted that the orders would still have to be annulled because it is certain that they rest in part, at least, upon the exertion of this power.

In the case of *Anchor Coal Co.* v. *U. S.*, 25 Fed. (2d) 462 (1928), the decision of a three-judge court was reversed by this Court with directions to the lower court to dismiss the bill of complaint without costs because between the time of the decision and the time of appeal certain matters transpired which rendered the controversy moot (279 U. S. 812), the decision has been cited with apparent approval in several subsequent cases by the Supreme Court. Among others, *U. S.* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 510 (1935); *Texas & Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 638 (1933). In the *Anchor case, supra,* the plaintiff contended that an order of the Commission requiring the cancellation of certain reduced rates on coal constituted an attempt to equalize

commercial conditions as between the mining region from which the reduced rates were to apply and other less prosperous mining regions whose costs of production were greater. Judge Parker said (at 471):

> "Much has been said as to the binding effect of the order entered by the Commission, but the law with regard thereto is well settled. If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence, nor consider the wisdom of the Commission's action, which, within the scope of its jurisdiction, is conclusive, unless there be some irregularity in the proceeding or some error in the application of rules of law. *Chicago, R. I. & Pac. Ry.* v. *U. S.*, 274 U. S. 29, 33, 47 S. Ct. 486, 71 L. Ed. 911; *Virginian Ry. Co.* v. *U. S.*, 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463; *Western Paper Makers' Chem. Co.* v. *U. S.*, 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941. If, however, in making the order complained of, the Commission has exceeded its powers, or has proceeded upon an erroneous theory of law, or if its action is so manifestly arbitrary and unreasonable as virtually to transcend the authority conferred upon it, the courts are not bound by its action. *Southern Pacific Co.* v. *I. C. C.*, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; *I. C. C.* v. *Union Pacific Co.*, 22 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308; *U. S.* v. *N. Y. C. R. R.*, 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470; *U. S.* v. *New River Co.*, 265 U. S. 533, 540, 44 S. Ct. 610, 68 L. Ed. 1165.
>
> "We think that the enforcement of the order here complained of should be enjoined: (1) Because the Commission exceeded its powers, in that its action was based, *in part, at least,* upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustment of rates; (2) because it proceeded upon an erroneous theory of law, in holding that the burden was upon the southern carriers to justify a reduction of rates by a comparison of the reduced rates with lower maximum rates prescribed

> for a competing field; and (3) because it proceeded upon an erroneous theory of law, in holding that the burden was upon the carriers here to justify the proposed reduction of rates under section 15(a)(2) of the Interstate Commerce Act, as added by section 422 of the Transportation Act of 1920 and the Hoch-Smith Resolution."

In *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274 (1924), this Court held that if an order of the Commission was predicated in part upon data taken from the Commission's files but not introduced in evidence the order must be set aside. At page 286 the Court said:

> "The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part, upon data taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence * * *. The contention of the Commission is that 'no doubt it will be necessary to refer to the annual reports of all these carriers' its rules of practice permitted matter in the reports to be used as freely as if the data had been formally introduced in evidence."

The Court held against this contention of the Commission and concluded (290):

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

It will be noted that in the first of these cases, the *Anchor Coal Company case*, the Court held that even though the Commission's order was based only *in part* upon the assumption of a power which it did not have (the power to give operative effect to unequal industrial conditions in determining reasonable rates) the

order would have to be set aside and that in the second case the Supreme Court held that even though the order was based only "in part" upon evidence not before the Commission, such evidence "may have been an important factor in the conclusions reached by the Commission" and that therefore the order must be held void. In the instant case, we do not have to indulge in surmise to find out whether competition between shippers was an important factor in leading the Commission to its conclusions. It tells us definitely that it was. Discussion of competition and the ability of southern shippers to market their coke in the North, and then the Commission prescribes the very rates that were proposed by the southern producers, who admit that their request for a reduction is based upon competition with northern producers. It is submitted, therefore, that even if it were to be found that the orders do not rest wholly upon the assumption of power to require reductions to meet competition, since, beyond peradventure, they rest in part upon this factor they must be held void if the Court finds that the statute did not grant that power to the Commission.

V.

THE COMMISSION PROCEEDED UNDER ERRONEOUS CONSTRUCTIONS OF LAW AND MISAPPREHENSIONS IN RESPECT OF ITS POWERS, IN TESTING THE INTERTERRITORIAL RATES FROM THE SOUTH BY THE LEVEL OF RATES APPLICABLE WITHIN CENTRAL TERRITORY, INSTEAD OF EMPLOYING ORDINARY AND WELL-RECOGNIZED STANDARDS OF RATE DETERMINATION.

As previously stated, the basis of interterritorial rates fixed by the Commission in I. & S. Docket 3511, although constituting in the main a downward revision in previously existing rates, was accepted by appellants and is the basis that has been contended for by them

throughout these proceedings. The requests for rehearing or reconsideration filed by the southern interests in that case had been denied by the Commission. It will be noted from the lengthy decision therein that that case was decided on a comprehensive record, participated in by the various northern and southern railroad and commercial interests. In the reports and orders subsequently issued by the Commission in the I. & S. Docket 3985 proceedings, the sole ground for the reductions required was the level of rates prevailing between points in central territory, and it was to the central territory basis exactly that the Commission's final report and order required the interterritorial rates to be reduced. This departure from long and well-recognized standards of rate determination was wholly without legal sanction, and contrary to principles theretofore frequently enunciated by this Court and generally followed by the Commission.

The printed volumes of the Commission's reports are full of cases dealing with similar interterritorial rates between the North and South, and in them the Commission, in view of the more favorable traffic and transportation conditions in the former, had found that interterritorial rates should be higher than the basis which it had prescribed for application within the North. Thus, in *Blue Ridge Glass Corporation* v. *A. & B. R. R. Co.*, 201 I. C. C. 401, the Commission, citing earlier decisions to the same effect, said at pages 428-429 of its decision:

> "It is well recognized that transportation conditions as a whole are more favorable in official territory than the southern territory. For that reason higher rates may properly be maintained for interterritorial movements between the two territories than for local movements within official territory."

Moreover, it was this difference in conditions in the two territories which led the Commission to prescribe ma-

terially higher divisions for the southern than the northern roads out of the joint through fruit rates from the South to northern destinations. *Atlantic Coast Line R. R. Co.* v. *Arcade & Attica R. R. Corp.*, 194 I. C. C. 729; 198 I. C. C. 375, affirmed in *Baltimore & Ohio Railroad Co.* v. *United States*, 298 I. C. C. 349.

In *Ann Arbor R. R. Co.* v. *United States*, 281 U. S. 658, the Court at page 666:

> "* * * True, in both the original and supplemental opinions, it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the commission construed it, and not that they were deemed unreasonable under Sec. 1 (5) or Sec. 3 (1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but believed by it to have been brought into the problem by the resolution."

The Commission attempts to justify the prescription of the central territory basis from the South in its final report in I. & S. Docket 3985 by citing and comparing the traffic density of a single railroad in the South with that of lines north of the Ohio River. In this connection, it said (R. 36):

> "The revenue net tons per mile of road transported by the Cincinnati, New Orleans & Texas Pacific Railway Company, which terminates at Chattanooga and Cincinnati, exceeded that handled by such carriers as the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, New York Central Railroad Company, and the Wabash Railroad Company, and the average handled by all lines operating in central territory, even when those which extend into western trunk line, southwestern, and southern territories are excepted."

The record shows, however, that the southern line referred to handles only a negligible quantity of coke, aggregating only 2738 tons in a single year (R. 383), out of the hundreds of thousands of tons of coke shipped from southern origins. If examples of individual roads' densities in the two territories were to be compared, it could be demonstrated from figures of record that lines in central territory, such as the Pittsburgh & Lake Erie, which actually originates a substantial coke tonnage, have double the number of revenue net tons per mile of road cited by the Commission for the Cincinnati, New Orleans & Texas Pacific.

The Commission, in its second report in I. & S. Docket 3985, mistakenly assumed that the central territory lines have no interest in interterritorial rates provided that the level of such rates is no lower than that prevailing within their own territory. In this connection, the Commission said (R. 36):

> "If interterritorial rates higher than column 2 rates were warranted, as the central carriers contend, because of more difficult operating conditions in the South it would be proper that the increment accrue solely to the southern carriers. The carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by the prescription of the column 2 rates."

Of course, a fallacy in the foregoing statement is that central carriers will obtain as much from a given haul under the prescribed interterritorial rates as they would for a comparable haul within their own territory. Nothing could be further from the fact. Practically every destination in central territory can be reached by a single line of railroad from any of the producing points, and the entire revenue from an intraterritorial movement would accrue to that line. In no instance can the

southern producer reach central territory markets over one line. At least two carriers must participate in the haul, so that the revenue must in all cases be divided between two or more railroads. But of vastly more consequence to appellants is the question of their divisions from the prescribed rates. The Commission takes for granted that interterritorial rates from the South will be divided just as appellants divide between themselves the revenue from coke traffic moving within their own territory, but the decisions of the Commission dealing with similar interterritorial rates and according southern lines as divisions a far greater proportion of such rates than was granted the northern lines are by no means reassuring. See *Baltimore & Ohio R. R. Co.* v. *United States,* 298 U. S. 349.

Subsequent to the issuance of the reports and orders in these cases, the Commission made an order in *Sugar from Gulf Coast Port Groups to Northern Points,* 220 I. C. C. 623, wherein, as in the case at bar, it required to be established on sugar from points in the South to northern destinations the same low level of rates as obtained within the North. In that case, as in the instant proceeding, it was shown that the rate basis contended for by the northern roads was higher than prevailed (p. 628) either within the North or the South. The Commission's report in that case further shows (pp. 630-631) that "southern carriers concede that neither the present nor the suspended rates are unreasonably high if the standard of maximum reasonableness is to be determined solely by operating conditions" just as they have conceded in the case at bar that the I. & S. 3511 rates do not exceed reasonable maxima. The Commission's finding in that case (p. 642 of its report), that in the light of existing transportation conditions, the record did not justify higher interterritorial rates than applied intraterritorially within the

territories, was appealed to the United States District Court for the Northern District of New York and was tried before a three-judge court, consisting of L. Hand, Circuit Judge, and Cooper and Coxe, District Judges. The Court, speaking through Circuit Judge Hand, in a well-considered opinion, set aside the reduced rate orders. (*Baltimore & Ohio R. R. Co.* v. *United States*, In Equity No. 3083, not yet reported.)

Bearing in mind that the rates here contended for by appellants are those fixed by the Commission itself in the I. & S. Docket 3511 proceedings after extended hearings and on a comprehensive record, and that by no proper test have those rates been shown to be unreasonable or improper, it is submitted that the action of the Commission, in requiring reductions in interterritorial rates to the prescribed central territory level, for no other reason than to enable southern manufacturers better to meet the competition of the northern producers, was unwarranted, arbitrary and capricious.

At the hearing in the lower court (R. 586-7, 589-590, 597-8) the southern interests suggested that the assailed orders might find support in the phrase of Section 15a (2) of the Interstate Commerce Act which provides that:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic * * *." *

Their argument is that if the rates within central territory are on a lower level than those from the South to central territory, the ability of southern shippers to meet

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* Paragraph 2 of Section 15a reads in its entirety as follows: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

the competition of northern producers in the central territory markets will be deterred, and therefore the movement of coke from the South will be restricted. (R. 589, 597) As is apparent from the Commission's report (R. 36) one of the two factors upon which the Commission relied in finally ordering that the rates from the South to the North should be on the same level as the rates within central territory and that they be reduced from the basis previously prescribed, was that in the prior report not enough weight was given to "the effect rates have on the interterritorial movement of the traffic."

That the southern interests' suggestion and the Commission's action finds no sanction in Section 15a(2) is, we submit, quite clear; first, because that section deals with reasonableness of rates and not with rate relations and; second, because Section 15a(2) is only intended to be used in broad revenue cases dealing with the entire body of rates of a large group of carriers or all the carriers of the country, and not with the rates of a limited number of carriers and on just one commodity. These two points will be discussed in the order named.

By its very terms Section 15a(2) relates to the Commission's power to prescribe "just and reasonable rates." It does not purport to deal with relationships between rates. When it is asserted that, if the rates from the South to central territory were higher than the rates within central territory the movement from the South to destinations in central territory would diminish because the central territory producers would get the markets because of their lower level of rates, it is clear that it would not be any intrinsic quality of the rates from the South to the North that could be said to diminish the movement, but that it is the relation of the rates from the South to the North with those within central territory. Indeed, if the rates within central territory

were to be reduced to one-half of their present level without any change in the prescribed rates from the South to central territory, unquestionably there would be an adverse effect on the movement from the South to central territory because the southern producers would be handicapped in their competition with the central territory producers. Yet it could not be said that the rates from the South to the North were unreasonable. All the facts concerning the reasonableness of these rates would have been the same as when the Commission prescribed them. The only change would have been the reduction in the competitors' rates. Section 15a(2) dealing, as it does, only with reasonableness, contemplates that there shall be nothing in the rates themselves that unduly restricts movement—that they shall not be intrinsically so high that the traffic cannot reasonably be expected to bear them. If it were to be construed to mean that reductions might be made in order to allow a shipper to better his position in a market to which another shipper has lower rates, it would empower the Commission to parcel out markets to various shippers and to equalize geographical locations and other natural advantages. By the admission of its own decisions and under the decisions of this Court the Commission has no such power. *Chamber of Commerce of New York* v. *N. Y. C. & H. R. R. R. Co.*, 24 I. C. C. 55, 70; *Eau Claire Board of Trade* v *C. M. St. P. & P. R. Co.*, 5 I. C. C 264, 293; *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 637; *Anchor Coal Co.* v. *United States*, 25 Fed. (2) 462.

The second reason in support of our assertion that Section 15a(2) cannot properly be relied upon to support the assailed orders is that that section is intended to be used in broad revenue cases and not in a case like the present one. This may be demonstrated by recalling the background of the section. As it now stands, Section 15a(2) was enacted in 1933 (48 Stat. 220). It replaced

the provisions which had been enacted as part of the Transportation Act of 1920 and which directed the Commission "in the exercise of its powers to prescribe just and reasonable rates" to adjust rates so that the carriers as a whole or in rate groups might earn a fair return on a fair value and to consider, in determining what was a fair percentage of return, "the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation." One of the most important provisions of the old Section 15a was the so-called recapture clause under which the carriers earning in excess of the percentage of return fixed as fair, were required to turn the excess over to a Government contingent fund (41 Stat. 488).

In *United States* v. *Louisiana,* 290 U. S. 70, this court said at page 75 that the "broad purpose" of the old Section 15a was "to maintain an efficient transportation system by enabling the carriers to earn a fair return." And at page 76 of that decision the court said that "the subject matter to which the section is to be applied" is "the production of increased revenue by a nationwide or group increase of rates * * *." At page 79 the court indicated that a proceeding involving "only one railroad and one commodity * * * was not the general revenue proceeding authorized by Section 15a."

It is quite clear, therefore, that the statutory predecessor of the present Section 15a(2) was not one that could be employed in a case like the present one.† That Section 15a(2) as it now stands is also properly to be employed only in the general revenue cases is clear from the circumstances of the change in the statute as well as from subsequent decisions.

† To the same effect is *Eastern Class Rate Investigation,* 164 I. C. C. 314, 389.

In the 1931 report of the Interstate Commerce Commission to Congress * the Commission discussed the old Section 15a(2) in detail and recommended to Congress that it be repealed. The following year in its report for 1932 ** the Commission recommended (page 100):

> "That for section 15a of the interstate commerce act a new section be substituted which will eliminate the present recapture provisions, both for the future and retroactively, and which will provide a new rule of rate regulation for that now contained in paragraph (2), such new rule to make it clear *that in regulating the general level* of rates, fares, and charges the commission shall, among other things, be guided by the need for producing, as far as possible, revenues which will be sufficient for the maintenance of an adequate national railway transportation system, and also to recognize the principle that the railroads may justly earn a surplus in times of prosperity as a safeguard against deficiencies in times of depression." (Italics inserted)

It is quite clear, therefore, that in asking for a change in this section, the Commission was simply asking Congress to change the rate-making rule of general revenue cases.

Subsequent to the change in 15a(2) this court indicated in *Florida* v. *United States*, 292 U. S. 1, that the new section, like the old, was to be applied in general revenue cases. At page 6 of that decision it is said:

> "The purpose of the changes in section 15a is not left in doubt. They were made with the manifest object of eliminating the provisions for the recapture of excess income of carriers and of revising the rule as to rate making. The requirement imposed by Transportation Act, 1920, for the adjustment of rates according to rate groups was

* Forty-fifth Annual Report of the Interstate Commerce Commission, 1931.

** Forty-sixth Annual Report of the Interstate Commerce Commission, 1932.

abolished and in substitution the Commission was directed to give due consideration to the factors which are specified in the section as amended. Thus the Commission is to consider, among other factors, 'the effect of rates on the movement of traffic;' 'the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service;' and 'the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.'

Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under Section 13(4) intact."

The Commission indicated a similar view in *Gasoline From San Francisco Bay Points to Ogden, Utah*, 198 I. C. C. 683. At page 697 of that decision it said:

"The broad purpose of and the ultimate responsibilities imposed upon us by both the old and the new section 15a(2) are the same, namely, in prescribing rates to give 'due consideration * * * to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient man-

agement, to provide * * * adequate and efficient railway transportation service.'" (Omissions by the Commission.)

It would seem quite clear, therefore, that Section 15a(2) announces a rule of rate making to be employed in the general revenue cases and not in a case like the instant one where the rates on only one commodity and where a limited number of carriers are involved. It is pertinent to observe also that "the broad purpose" of the new section 15a(2) to provide the carriers with sufficient revenue to insure efficient national transportation would not be served by reducing the rates from the South to the North in order to cause more traffic to move on those rates by displacing the movement of a like amount of traffic from one point to another in central territory.

VI.

THE ORDERS OF THE COMMISSION ARE NOT SUPPORTED BY NECESSARY FINDINGS.

In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499 (1935), the Supreme Court affirmed the decision of the District Court which set aside an order under which the Commission attempted to prohibit a railroad from reducing certain rates on coal on the ground that it "would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by Section 15a of the Act" and that therefore they would be "unreasonable and in violation of Section 1 (5) [which condemns unreasonable charges] and Section 15a (a) of the Act."

One of the grounds upon which the order was attacked was that it was not supported by the findings. The Supreme Court said (504):

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasijurisdictional facts conditioning its power. *Florida* v. *United States,* 282 U. S. 194, 215, 75 L. Ed. 291, 304, 51 S. Ct. 119; *United States* v. *Baltimore & O. R. Co.,* January 7, 1935, 293 U. S. 454, *ante,* 587, 55 S. Ct. 268. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States,* 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119, *supra.* Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning."

And at 506:

> "The statement in the second of these paragraphs that the proposed rates would be 'unreasonable' must be read in the light of the report as a whole, and then appears as a conclusion insufficient as a finding unless supported by facts more particularly stated. Cf. *Florida* v. *United States, supra* (282 U. S. 213, 75 L. Ed. 303, 51 S. Ct. 119); *Southern P. Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 449, 55 L. Ed. 283, 31 S. Ct. 298."

And it affirmed the decision of the lower court on the ground that the findings did not support the order.

In *Atchison, Topeka & Santa Fe Ry. Co.* v. *United* States, 295 U. S. 193, this Court, in setting aside an order of the Commission for lack of proper findings, said (p. 201):

> "Its (the Commission's) report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambigous statements in the report intended to serve as findings may by construction be

given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States,* 282 U. S. 194, 215. Recently this court has repelled the suggestion that lack of express finding by an administrative agency can be supplied by implication. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 433. *See Beaumont, S. L. & W. Ry.* v. *United States,* 282 U. S. 74, 86. *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320, 341."

In *Anchor Coal Co* v. *United States,* 25 Fed. (2d) 462, the District Court reviewed an order of the Commission in the so-called *Lake Cargo Coal Cases,* 139 I. C. C. 367 wherein the report had been amended to include a finding that the rates were "unjust and unreasonable" (25 Fed. (2d) 470). The Court said at page 464 of its decision in that case:

"To understand, however, exactly what the power is which the Commission has assumed to exercise it it necessary that we go behind its merely formal conclusions that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusions. This it is our duty to do. *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; *U. S.* v. *N. Y. Central Railroad,* 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470. And, in the performance of this duty, it is necessary that we analyze not only the report of the Commission accompanying the order whose enforcement we are asked to enjoin, but also the reports made in 1925 and 1927 with regard to the reductions of rates from the northern field, in the latter of which the differential was increased from 25 to 45 cents."

There are no findings in the reports of the Commission in I. & S. Docket 3985, which can be said to support the findings of unreasonableness in its decisions.

None of the statements made therein, even if taken at their face value, can be construed as indicating in any manner or degree that the basis of rates prescribed as reasonable maxima by the Commission in I. & S. Docket 3511 had become unreasonable in the period intervening between the decision in that case and those in the 3985 proceedings.

CONCLUSION.

Appellants submit that the orders of the Commission are unlawful and void and that the prayers of the petition for injunctive relief should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 638.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois.

APPELLANTS' REPLY BRIEF.

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Appeal from the District Court of the United States for the Northern District of Illinois.

APPELLANTS' REPLY BRIEF.

Appellants Were Denied the Notice and Hearing Provided for by the Statute and the Constitution.

Appellants' point that the order of April 30, 1936, in I. & S. Docket 3985, was made without notice and hearing is discussed at pp. 19-24 of their original brief. In opposition to this point appellees, the Southern railroads, contend that

the orders did not, in fact, require reductions to destination points which were not involved in the suspended schedules. This contention is made also by the Government and the Commission, and by the Southern shippers, in their briefs. In the brief filed by the Government and the Commission, it is also urged that the point was not raised by the bill of complaint and that appellants may not be heard on it now, because they did not go back to the Commission with a petition for rehearing, or modification, or clarification.

The proposition of the Southern railroads, in which the other appellees join, that the order did not require reductions to points not in issue but was confined to destinations involved in the suspended schedules, represents a complete *volte face*. It will be recalled that the actual tariff publication of rates on coke from the South to the North is in the hands of the Southern lines. In obedience to the order of April 30, 1936, in I. & S. Docket 3985, those Southern railroads reduced the rates to central territory destinations without any limitation and not merely to those destinations that were involved in the suspended schedules. That their interpretation of the Commission's order was that it required reductions to all central territory destinations is, therefore, clear and it is difficult to perceive by what process they can now assert that it required reductions only to the points in issue.

The assertion that the order did not require reductions to points in central territory without restriction is also refuted, appellants submit, by the Commission's statement in its last report in I. & S. Docket 3985 (215 I. C. C. 384) that (R. 37):

> "Specific rates should be published to all destinations to which shipments are likely to move."

Since the rates in the suspended schedules were published to specifically named destinations, if the Commission intended to require reductions only to those points it would seem clear that it would not have undertaken to tell the carriers what destinations rates should be published to.

It is asserted by certain of the appellees that this point was not raised in the bill of complaint in the lower court. The brief of the Government and the Commission states (p. 3) that the allegation that the order was made without a hearing "was limited by the bill of complaint, by the answers, and by the findings of the court below, to the issue as to whether the order, made after reopening and reconsideration on the record as it then stood, and without further hearing, deprived appellants of a full hearing. The bill of complaint, however, contained no such limitation. There was no reference made in appellants' bill to "reopening and reconsideration on the record as it then stood" or to any record. Indeed, the first of the three successive orders was made in I. & S. Docket No. 3511, the record in which was not before the Commission or the court in this case. Nevertheless, appellees, the Government and the Commission persist (brief, pp. 21, 22) in ascribing to appellants' brief and the bill of complaint language which is not there present. The bill of complaint averred as a ground of invalidity (R. 11):

> "4. That the third successive order of the Commission, dated April 30, 1936, was made without hearing, but only on petitions of southern carriers and shippers as aforesaid, is arbitrary and unjust, and is without any evidence to support it."

In connection with appellees' (the Government and the Commission) assertion that the point was only touched upon in the argument below, it should be noted that the presiding judge suggested (R. 565-567) that the argument should be confined to a "general outline of the positions," reserving full discussion for brief, and that the court then decided the case directly from the bench without giving appellants the opportunity to submit a brief. Nevertheless, in outlining the case, appellants asserted that the Commission denied appellants a fair hearing (R. 564) and elaborated on the point at pp. 608-609 of the record as follows:

> "I attempted to point out this morning that in this 3985 order the Commission reduced every coke rate in

> central territory although no such rates were in issue, except those where the northern carriers were attempting to bring a few rates that were below the 3511 scale up to the scale basis."

The point was also covered in appellants' proposed findings of fact (No. 21, R. 175) and conclusions of law (No. 2, R. 178).

The Government and the Commission contend that the appellants should have petitioned the Commission for a "rehearing or modification or clarification of the order." Had the appellants felt there was need for "clarification" of the order they would have petitioned for it. But—like the Southern railroads, appellees here,—appellants found no lack of clarity in the order. They read therein that the rates "to destinations in Illinois, Indiana, Ohio and the lower peninsula of Michigan" must be reduced and, in the report, which was by reference made a part of such order, that "Specific rates should be published to all destinations to which shipments are likely to move." The Southern railroads thereupon published rates to central territory destinations generally. They too found no lack of clarity in the order.

Appellees' suggestion, made for the first time here, that appellants should have petitioned the Commission for "rehearing or modification" as a condition precedent to their being heard in court is, we submit, without foundation in law. The Urgent Deficiencies Act, under which this suit was brought, does not impose any such obligation on appellants.

In *B. & O. R. Co.* v. *United States,* 298 U. S. 349, at page 371, this Court said: "No act of Congress requires carriers, in advance of suit to set aside divisions or other orders, to petition the Commission for rehearing, repeal or modification. Nor has Congress attempted to limit the time within which the carriers may sue to enjoin enforcement of an order of the Commission prescribing rates and divisions."

Moreover, appellants' attack upon the orders of the Commission rests upon other grounds in addition to that here discussed and which are independent of procedural matters. The Commission, having reduced the rates three times within a period of three years, each time purporting to change its mind as to what is "maximum reasonable" and each time finding something lower than the last to be maximum reasonable, it did not appear to respondents that these grounds would receive any real consideration from the Commission.

Only one of the appellees, *i. e.*, the Southern shippers, attempts to answer the point that the order is invalid because of a lack of notice and hearing, even as to those destination points which were actually included in the suspended rate schedules. With regard to these destinations (as well as all other central territory destinations) appellants assert that they were deprived of their right to notice and hearing because the Commission was at no time asked to prescribe rates in I. & S. Docket 3985. The step—and the only step—there asked to be taken was that the Commission find the rates in the suspended schedules unlawful. But the Commission did not do only that; it went further and ordered the carriers to reduce the existing rates and to publish and maintain in the future rates which it there prescribed. Appellants had no notice that the Commission would prescribe any rates, or do anything other than pass on the lawfulness of the rates contained in the suspended schedules. Indeed, not even did the petitions for reconsideration, which preceded the last report and order, ask the Commission to prescribe any rates. (R. 512 *et seq.*; 538 *et seq.*)

The Southern shippers assert (brief, pp. 15-16) that the Commission is given power to do this by Section 15 (7) of the Interstate Commerce Act. It is true that that section gives the Commission the power to make "such order with reference [to a suspended rate] as would be proper in a proceeding initiated after it had become effective." But it does not purport to grant this power without provision

for notice and hearing. Both Section 15 (7) and 15 (1) (which gives the Commission the power to prescribe rates) contain requirements for notice and hearing. It is submitted that as a condition to the exercise of the power to prescribe rates, notice must be given of the intention that rates will be prescribed if the suspended rates are found to be unlawful. When the only notice given is, as here, that the investigation will simply be into the lawfulness of the rates in the suspended schedule, the evidence is prepared to meet that issue and is confined to that issue alone. But, if notice is given that other rates will be prescribed if the suspended rates are found unlawful, it would seem obvious that the carriers must be given an opportunity to present evidence to show, among other things, within what limits rates might properly be prescribed, what the effect of possible prescriptions would be, and, conceivably, countless other matters entering into the fixation of rates.

The Orders of the Commission Were Against the Manifest Weight and the Indisputable Character of the Evidence.

It is difficult to understand the appellees' (the Government and the Commission) treatment of this subject in their brief. The outline and description of the evidence and the contentions of the parties regarding it, we believe, constituted a clear-cut and convincing demonstration of the Commission's failure to decide this case according to the manifest weight and the indisputable character of the evidence.

Without citing any page of the record to support the statement, the Government's brief says (pp. 25, 54) the evidence was conflicting. This is not true, so far as facts bearing upon the reasonableness of rates is concerned, for as we pointed out in our original brief the witnesses for the southern interests agreed that the rates here contended for by appellants, *i. e.*, the scale 3 prescribed in I. & S. Docket 3511 for interterritorial application, was not in excess of rea-

sonable maxima. It was likewise admitted on all sides that transportation conditions in the South were more burdensome and expensive and therefore justified a higher level of rates interterritorially from the South to the North than prevailed within the latter territory. When the case was orally argued before the Commission, as this record shows, not one of the four representatives, who appeared and argued for southern producers and Southern railroads, contended there that the column 3 rates then proposed in the tariffs under suspension were in excess of reasonable maxima. And later, after the Commission had struck down those tariffs and stated that interterritorial rates on a somewhat lower basis might be established, the southern shippers and carriers, in the petitions for reconsideration they filed, made no claim of unreasonableness, but instead argued that the Southern roads should determine for themselves whether they would establish that basis and that the northern roads, although involuntary partners in the joint through rates, should be denied any voice in the measure of the rate to be charged on the traffic in question. (R. 514) In view of this condition of the record, we are at a loss to understand the statements made in the Government's brief.

The Southern interests, railroad and shipper, unquestionably sought the right to put into effect the same scale of rates as applied within the North, and the record does contain statements to the effect that higher rates would restrict or prevent the movement of southern coke into that territory. Such statements, even if accepted as evidence of probative value in cases involving prejudice or preference under Section 3 of the Interstate Commerce Act, can not seriously be said to constitute evidence of unreasonableness, which is the question in issue here. The point is that the Commission condemned rates as unreasonable under Section 1 of the Act, when there was unanimity in the evidence of all parties of record that those rates were not in excess of reasonable maxima, and not the slightest contention to the contrary was ever voiced in the arguments made

or petitions filed with the Commission by the Southern shippers and carriers.

What the Commission did, and the reasons for its doing so, are not proper subjects for speculation or surmise. It simply took the scale of rates it had ordered to be applied in central territory, and required that it be made applicable also from the South into that territory, because, as stated in its second report in I. & S. Docket 3985 (R. 35):

> "The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect."

But what was there stated by the Commission is quite apart from any question of the reasonableness of rates. The situation complained of by the southern witnesses could, as well, have been cured by an alternative order under Section 3 of the Act. The witness for the Birmingham producers stated in his testimony that even within central territory some of the rates fixed by the Commission were "low". (Rec. 368) If too low for central territory, where the southern witnesses admitted transportation conditions are more favorable and therefore entitled to rates lower than within the South or interterritorially from the South to the North, there was clearly no justification for projecting its application to southern producing points.

The Orders of the Commission Were Not Supported by Substantial Evidence.

Appellees in their several briefs make no real attempt to answer appellants' argument under this heading, at pages 28-36 of their original brief. Instead, they seek to confuse the issue by ascribing to appellants certain artificial conten-

tions, which they say (as in the brief filed by the Government and the Commission, at page 48) invites the Court to examine all the evidence, appraise it, and hold that the Commission erred in its judgment as to the facts. Nothing could be farther from the fact as is clearly apparent from appellants' brief. We say there was in the record before the Commission no evidence of a substantial nature, tending to support the orders complained of herein, and the authorities cited by appellees, instead of disproving appellants' contention, actually sustain them.

Because the Commission in the third successive order reducing interterritorial coke rates from the South to central territory finally required the established of the basis it had previously fixed within the latter territory appellees are forced to concede that it was the comparison with those rates and the existence of certain untreated and chaotic rates applying within the South which led the Commission to condemn as unreasonable all such interterritorial rates. The cases of *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, and *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, are especially relied on by appellees, the Government and the Commission, but the language quoted from those decisions (brief, pp. 46-47) plain demonstrates the error of the Commission in basing its findings on the compared rates.

In the *Louisville & Nashville Case,* for example, this Court accorded special probative weight to rates previously fixed by the Commission. It was such a scale of rates, prescribed in I. & S. Docket 3511, that appellants seek to have applied on the traffic in question. It was further pointed out in the Court's opinion in that case that allowance should be made for "dissimilarity in conditions", something that was not done by the Commission in this case, although it was admitted on all sides that conditions surrounding movement of the interterritorial traffic were more onerous and made transportation more expensive than within central territory. The Court there was speaking of rates which were

higher than all others. In the case at bar, the scale basis appellants are contending for is lower even than was fixed by the Commission for application wholly within the North in cases cited at page 27 of appellants' original brief, and exactly the same as was contemporaneously prescribed interterritorially from central territory to points west thereof.

In the *Skinner & Eddy Case, supra,* the quoted language is likewise predicated on "comparable service," something which is not here shown. The binding force of comparisons with rates voluntarily established by carriers scarcely merits discussion here, for whatever might be said with respect to use of depressed rates against railroads maintaining them, there is no showing that these appellants have in effect anywhere on their own lines a basis of coke rates lower than the reasonable maximum level fixed by the Commission in I. & S. Docket 3511 and the materially higher scale basis prescribed for the eastern part of their territory in the other cases previously mentioned. Appellees make no attempt to reply to appellants' showing on the point that the southern rates have never been treated by the Commission or revised by the carriers, that they are in a chaotic state and depressed because they were originally established, and have since been maintained, to meet the competition of coal and, therefore, under a long line of decisions of the Courts and the Commission are without any probative value as rate comparisons.

At page 67 of the Government's brief, it is said in this connection:

> "Coke transported from the South to central territory moves every mile of the way through territory in which the prevailing coke rates are approximately the same as the Column 2 scale."

The record does not bear out the foregoing statement. The following statement contains the rates of the Louisville & Nashville Railroad from Birmingham to all points, shown in exhibits of record, lying intermediate to central terri-

tory, and similarly all rates of the Cincinnati, New Orleans & Texas Pacific from Chattanooga to intermediate destinations on its line:

From Birmingham

To	Distance	Rate (cents)	C.F.A. Scale Rate (cents)	Percentage relation rate to C.F.A. scale (Per cent)
Decatur, Ala.	85	160	175	91
Nashville, Tenn.	205	203	245	83
Bowling Green, Ky.	278	293	275	107
Owensboro, Ky.	345	293	315	93
Henderson, Ky.	349	293	315	93
Evansville, Ind.	361	293	325	90
Louisville, Ky.	392	293	335	87
Cincinnati, O.	481	338	372	90
From Chattanooga				
Somerset, Ky.	177	259	225	115
Danville, Ky.	222	259	255	102
Lexington, Ky.	256	259	265	97
Cincinnati, O.	338	259	305	85

How can it be said then that the prevailing coke rates on those Southern lines are approximately the same as the central territory basis, in view of the wide variation in relation to that scale, and the fact that for hauls between 177 and 338 miles in the South a common rate applies, *i. e.*, $2.59, while in central territory the rate would range from $2.25 to $3.05 for those distances?

In dealing with certain revenue figures, it is said in the Government's brief (p. 44):

> "It seems more appropriate to take the figures excluding the Ohio River since these Ohio River crossings are reached and served by southern lines."

but appellees fail to grasp that many important points beyond the Ohio River should be excluded for the same reason. This is especially true of Chicago, and practically

every other city of importance in Illinois, as it is of Indianapolis and other Indiana points, which, like the Ohio River points referred to, are served directly by railroads extending from southern coke producing points.

The first of the three rate comparisons characterized in the Government's brief (page 40) as of outstanding importance was the scale of coke rates prescribed by the Commission in I. & S. Docket 3511 for application within central territory, and as to this case, appellees say:

> "These rates were prescribed by Division 4 of the Commission in Coke between Points in Central and Illinois Territories, supra, and are evidently satisfactory to the carriers, since they have made no complaint against them; and it may be noted that the Column 2 scale as so prescribed involved both increases and reductions and had for its purpose a uniform adjustment without materially increasing or decreasing carrier revenue."

But what appellees seemingly overlook is that in the very same report, Division 4 also fixed the scale of rates to be applied from southern origins to central territory, and what appellees say above respecting appellants' attitude towards the column 2 rates expresses as well their view of column 3 in its interterritorial application, save that its establishment resulted in very drastic reductions in carrier revenue.

In this connection, the statement appears several times in the Government's brief (pages 24, 49) that reductions flowing from the three successive rate orders was not more than 10 per cent. To many destinations in central territory, the reductions were far more severe. Thus from Birmingham to Cleveland, Ohio, the rate changes were as follows:

Rate in effect prior to order in I. & S. Docket 3511	$6.03 per ton
Rate ordered in I. & S. Docket 3511....	5.00 per ton
Rate ordered in I. & S. Docket 3985....	4.55 per ton
Total reduction	$1.48 or 24.5%

In the Government's brief (pp. 42-43) considerable stress is laid on the fact that 54 carriers in the North did not restrict their concurrences, but as there were then in effect to destinations on central territory lines named no rates other than the column 3 scale, to which reductions had been made as a result of the order in I. & S. Docket 3511 there was no occasion for lines like the Akron, Canton & Youngstown, Ann Arbor, Detroit & Mackinac, Wheeling & Lake Erie, and others, issuing further concurrences. Reference is made to those 54 carriers operating in the four northern states, but it is noteworthy that in the quoted language from the Commission report, on the same page of the brief, the Commission only refers in that connection to "carriers in Illinois territory that serve southern origins or have direct connection with such carriers, and the western trunk-line carriers."

Conclusion.

It seems unnecessary to make further reply to, or undertake correction of, various other statements and contentions advanced in appellees' briefs. They utterly fail to disprove the facts and arguments presented by appellants, or challenge the force and effect of authorities relied on by them. To the extent that they purport to state appellants' position with respect to the several grounds urged on this appeal, or contradict the legal effect of matters contained in appellants' brief, we submit that the grounds relied on are there clearly set forth and there is no occasion for appellees mistaking or misstating them. Appellants reiterate and reaffirm all that is there said, with respect to the unlawfulness and invalidity of the Commission's orders in I. & S.

Docket 3985, dated March 11, 1935, and April 30, 1936, and its order in I. & S. Docket 4198, dated April 30, 1936.

The decree of the District Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 638.

BALTIMORE & OHIO RAILWAY COMPANY, ET AL.,
APPELLANTS,

versus

UNITED STATES OF AMERICA, ET AL.,
APPELLEES.

BRIEF FOR ALABAMA IRON & STEEL SHIPPERS CONFERENCE, APPELLEE.

J. V. NORMAN,
Counsel for Alabama Iron & Steel Shippers Conference, Appellee.

HUGH WHITE,
Of Counsel.

Dated at:
Louisville, Ky.,
March 17, 1938.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 638.

BALTIMORE & OHIO RAILWAY COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF FOR ALABAMA IRON & STEEL SHIPPERS CONFERENCE, APPELLEE.

REFERENCE TO THE OFFICIAL REPORT OF THE FINDINGS OF LOWER COURT AND THE INTERSTATE COMMERCE COMMISSION.

This suit was brought under the Urgent Deficiencies Act of 1913 (Chapter 38, Stat. L. 208, 220), to set aside and vacate an order of the Interstate Commerce Commission prescribing reasonable maximum rates on coke from certain points in the South, principally Birmingham, Alabama, and Chattanooga, Tennessee, to certain

points in the states of Michigan, Ohio, Illinois and Indiana, known as Central Freight Association Territory.

The suit was instituted in the United States District Court for the Northern District of Illinois, Eastern Division, and was heard by a Three Judge Court, as required by the statute.

The Court, at the conclusion of argument, dismissed the case from the bench. No opinion was rendered but the Court made its findings of fact and conclusions of law, which are found at pages 161 to 168, inclusive, of the record.

The opinions of the Interstate Commerce Commission are reported in 208 I. C. C. 281 (R. 15), and 215 I. C. C. 384 (R. 33).

STATEMENT AS TO JURISDICTION.

On January 17, 1938, the Court announced its finding that probable jurisdiction had been shown. This being a proceeding to enjoin an order of the Interstate Commerce Commission, jurisdiction is conferred by the District Court Jurisdiction Act, 38 Stat. L. 219.

STATEMENT.

This brief is filed on behalf of the Alabama Iron & Steel Shippers Conference, an association of Alabama manufacturers, producers and shippers of certain commodities including coke, which intervened in behalf of the defendants. This Association includes in its mem-

bership the Alabama By-Products Corporation, which instituted the original complaint before the Interstate Commerce Commission, attacking the rates on coke from certain Alabama points to the territory here involved. Subseqeunt to the filing of that complaint certain producers of coke in Central Freight Association territory likewise filed complaints attacking the rates from Birmingham, Ala., Chattanooga, Tenn., and Wise, Va., to that territory, and the railroads serving Central Freight Association territory filed tariffs establishing a scale of rates for application within that territory. These tariffs were suspended by the Interstate Commerce Commission and the complaints referred to were consolidated for hearing with the hearing on the suspended rates and that case was entitled "Investigation and Suspension Docket No. 3511, *Coke Between Points in Central and Illinois Territories.*"

After extensive hearings the Commission made and entered its orders in that consolidated proceeding, 194 I. C. C. 640 (R. 42), in which it was held that the rates proposed by the carriers had not been justified and the Commission prescribed a mileage scale for application in Central Freight Association territory as well as a maximum scale for application from the South to Central Freight Association territory. These scales appear as Appendix 8 to the aforesaid report of the Commission, the scale prescribing rates for application in Central Freight Association territory being known as "Column 2 Scale" and the scale which the carriers were required to observe as maximum from the South

is known as "Column 3 Scale." The Column 2 Scale was put into effect in Central Freight Association territory and the southern carriers revised such of their rates from the South as exceeded the Column 3 Scale. Subsequently, certain of the railroads operating in Central Freight Association territory, appellants here, by amendment to their concurrences, required the southern carriers to establish as minimum rates the Column 3 Scale, which had been prescribed as maximum. On petition of the southern carriers and southern shippers the rates so published were suspended by the Interstate Commerce Commission and hearing was had thereon in a proceeding known as "Investigation and Suspension Docket No. 3985, Coke from Alabama, Tennessee & Virginia to Central Territory" (R. 15). In this proceeding the order of March 11, 1935, and the order of April 30, 1936, here sought to be set aside, were made and entered. The order of March 11, 1935, which it is admitted was made after notice and full hearing was subsequently modified on petition for reconsideration and the order of April 30, 1936, was entered on the same record as the order of March 11, 1935. It is this order of April 30, 1936, that is here under attack.

The question here presented is whether the order of the Commission under attack, prescribing reasonable maximum rates on coke from certain points south of the Ohio River to points in the territory north of the Ohio River, known as Central Freight Association territory, is supported by sufficient findings which are in turn supported by substantial evidence. There is no

question presented as to the jurisdiction of the Commission as it was exercising power to prescribe just and reasonable maximum rates, specifically vested in it by Section 15 of the Interstate Commerce Act.

The rates prescribed by the Commission are on the same scale as the Commission had itself previously prescribed as reasonable maximum rates on coke for application within Central Freight Association territory. The Commission found that the rates prescribed are also on the same level as the rates voluntarily maintained on coke in the territory south of the Ohio River and are substantially the same as the rates previously voluntarily maintained from the same points of origin to certain destinations within Central Freight Association territory. The Commission also found rates made on a higher basis than prescribed would retard if not prevent the movement of the traffic.

The appellants are railroads operating in Central Freight Association territory and they insist that the Commission should have prescribed rates for application interterritorially between Southern territory and Central Freight Association territory on a higher basis than rates maintained on the same commodity in either of said territories and higher than rates previously voluntarily maintained. This claim is based on the allegation that the part of the interterritorial transportation which is rendered in Southern territory is more difficult and expensive than the transportation in Central Freight Association territory, but the Commission found that there is not sufficient difference in transportation conditions to justify higher rates. The

purpose of the appellants is, of course, to have the interterritorial rates fixed so high as to prevent the movement of the traffic, thereby confining such movement to coke produced on the lines of appellants.

The railroads originating the traffic in Southern territory and participating in the movement to Central Freight Association territory, have intervened herein, in support of the Commission's order.

In addition to the findings, above set forth, the Commission also found that rates from southern producing points, made on the same scale as rates within Central Freight Association territory, would not result in discrimination against producers in Central Freight Association territory (R. 36, 37). The finding that the prescribed rates would not result in discrimination was attacked in the court below, but that issue has apparently been abandoned here or at least is not pressed in appellants' brief.

Upon the foregoing findings of fact the Commission made its ultimate finding that the rates prescribed, being on the same level as that obtaining in both territories and not substantially higher than previously voluntarily maintained, would be just and reasonable maximum rates. We submit that the specific findings of fact, thus made, are sufficient to support the ultimate finding and order of the Commission and we shall undertake to demonstrate that these findings are not only supported by substantial evidence but by the overwhelming weight of the evidence. We shall, however, first discuss certain other questions raised by appellants.

SUMMARY OF ARGUMENT.

I.

The order of the Commission is supported by four preliminary findings of fact: (1) That the prescribed rates are not lower than those maintained in the past; (2) that the level of rates in the two territories between which the interterritorial rates were prescribed is approximately the same in each territory and the same as the interterritorial rates prescribed; (3) that the differences in transportation conditions between the haul up to the Ohio River and the haul within Central territory are not sufficiently great to require an increase in the rates for the haul up to the Ohio River; and (4) that rates higher than those prescribed as reasonable maximum rates would further restrict, if not prevent, the movement of coke from the South to Central territory. These findings of fact are supported by substantial evidence and are sufficient to support the order of the Commission.

II.

The determination whether a rate is unreasonable is a question of fact and the Court will not undertake to determine the weight of the evidence nor consider the soundness of the Commission's reasoning, nor whether its decision is consistent with previous decisions, nor the wisdom or expediency of the Commission's action.

III.

There is no merit in the claim that the Commission's order was made without notice and hearing. The order was based upon a voluminous record, made after notice to all the parties, and the sole basis for the claim that there was no notice and hearing is the fact that the Commission entered its order upon petitions for reconsideration. Section 16-a, of the Interstate Commerce Act, specifically provides for such petitions and that the Commission may, upon granting such rehearing, change or modify its orders.

IV.

The order of the Commission did not go beyond the issues, but prescribed rates in lieu of the suspended rates, a power which is specifically vested in the Commission by Sections 15 (1) and 15 (7) of the Act.

V.

The Commission did not err in considering the effect of the rates on the movement of traffic since it is specifically required to do so by the provisions of Section 15-a (2), and since such consideration is a necessary element of the determination of reasonableness of rates.

VI.

Neither the fact that the Commission reached a different conclusion from that previously reached on the same record, nor the statements made in the dis-

senting opinion, can affect the validity of the Commission's order.

VII.

The oft-repeated contention that the Commission tested these rates solely by rates applicable within the North and to allow competition in Central territory markets finds no support in the record.

VIII.

The order of the Commission prescribing reasonable maximum rates for future application having been made in the exercise of a delegated legislative power after notice and hearing, being supported by sufficient findings which in turn are supported by substantial evidence, there being no irregularity in the proceeding and no error in the application of the rules of law, the order must be sustained.

The Determination Whether a Rate Is Unreasonable Is a Question of Fact and This Court Will Not Undertake to Determine the Weight of the Evidence, nor Consider the Soundness of the Commission's Reasoning, nor Whether Its Decision Is Consistent With Previous Decisions, nor the Wisdom or Expediency of the Commission's Action.

It seems clear that this suit was instituted because the order of the Commission resulted from a change in the Commission's conclusion on the evidence as to what would constitute a reasonable rate to be exacted in the future. Throughout the pleadings and through-

out appellants' brief, it is urged, over and over again, that the Commission changed its ruling without substantial evidence to justify such change. In considering the validity of the order, however, the question is as to whether the order is supported by substantial evidence and not whether there was substantial evidence to justify the Commission in changing a conclusion previously reached on the same evidence.

In the court below appellants insisted on re-hashing the many ramifications of this whole litigation, relying upon a history of the litigation to influence the court below to review the matter on its merits, which, of course, it had no right to do and peremptorily refused to do. The order here involved is an order prescribing rates for the future and is therefore an order made in the exercise of the legislative function of the Interstate Commerce Commission (*St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38, 50, 80 L. Ed. 1033, 1040). It is well established that such orders are not reviewable on the ground that they are against the weight of the evidence, nor can the courts consider the soundness of the Commission's reasoning; or consider whether its decision was consistent with its previous decisions, or consider the wisdom or expediency of the Commission's action.

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province" (*Virginian*

R. Co. v. *U. S.*, 272 U. S. 658, 663, 71 L. Ed. 463, 467).

The reasonableness of a rate is a question of fact and the finding of the Commission thereon is conclusive unless the record establishes that clear and unmistakable error has been committed (*Illinois Central R. Co.* v. *I. C. C.*, 206 U. S. 441, 465, 51 L. Ed. 1128, 1138). The Court will not review the Commission's findings of fact by passing upon the credibility of witnesses or by weighing the testimony (*Merchants Warehouse Co.* v. *U. S.*, 283 U. S. 501, 508, 75 L. Ed. 1227, 1236). The inquiry of the Court is only for the purpose of ascertaining whether the finding of the Commission is so wanting in support by any substantial evidence as to make the action of the Commission arbitrary.

> "When the legislature appoints an agent to act within the sphere of legislative authority it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are especially applicable to such agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily (Citing Cases) * * *. In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies within the legislative agency acting within its statutory authority" (*St. Joseph Stockyards Co.* v. *U. S.*, *supra*, 51).

Nor will this Court consider the wisdom of the Commission's action:

> "If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action" (*Chicago, R. I. & P. Co.* v. *U. S.*, 274 U. S. 29, 33, 71 L. Ed. 911).

In *Western Paper Makers Co.* v. *U. S.*, 271 U. S. 268, 70 L. Ed. 941, this Court states the rule as follows:

> "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law."

The above principles of law are so well established that even appellants concede them to be controlling on page 29 of their brief, but, nevertheless, that is precisely what they would have this Court do—weigh the evidence and substitute its judgment for that of the Commission.

There Is No Basis for Claim that the Commission's Order Was Made Without Notice and Hearing.

The ultimate order of the Commission, which is here under attack, was made upon petitions for rehearing on the record before the Commission. Appellants insist that the making of this order upon petitions for reconsideration without further hearing constituted a

denial of notice and hearing. It is not denied, however, that there was a full hearing at which the record was made on which the ultimate order was based. We are at a loss to understand the ground for this contention because the Commission decided the case on the record before it and its action was the same as the action of a Court on a petition for rehearing.

Section 16-a of the Interstate Commerce Act specifically provides for petitions for rehearing and that the Commission "may reverse, change or modify" its original order on such rehearing. The section also provides that "applications for rehearing shall be governed by such general rules as the Commission may establish." It is not claimed that the petitions for reconsideration do not conform to the rules of the Commission, nor is it claimed that appellants, or any one else, petitioned for the right to introduce additional proof as the rules of the Commission provide they may do. This argument would therefore not only nullify Section 16-a of the Interstate Commerce Act, but abolish the power of tribunals generally to change their decision upon reconsideration even though the statute may, as in this case, specifically so provide.

The Order of the Commission Did Not Go Beyond the Issues Before the Commission.

Appellants contend (Br. 24) that the order of the Commission, here under attack, "transgressed appellants' rights to notice and hearing in two respects: (1) in condemning rates to points not involved in the sus-

pended schedules and in requiring that they be reduced, and (2) in affirmatively prescribing for future application rates to any points, including those involved in the suspended schedules."

Our first response to these contentions is that they are not supported by any allegation in the pleadings. In the bill of complaint no facts are set forth upon which such contentions can be made, nor is the validity of the order attacked on either of said grounds. Under well established principles the appellant will not here be heard upon an issue not raised by the pleadings. (*Texas & P. R. Co.* v. *U. S.*, 162 U. S. 197, 238; *Dayton-Goose Creek R. Co.* v. *U. S.*, 263 U. S. 456, 486).

However, there is no merit in either contention. The first contention that the order of the Commission condemned rates not involved in the suspended schedules and required that they be reduced is apparently predicated upon the language of the Commission's order which required the publication, from certain designated points in the South "to destinations in Illinois, Indiana, Ohio and the Lower Peninsula of Michigan, rates which shall not exceed those set forth in the appendix to said report * * *."

The contention seems to be that because the Commission did not specify the many hundreds of points in the order such order must therefore be construed to cover points not before the Commission in the proceeding. However, not only must an order of the Commission always be read in the light of its report (*Ga. Public Service Comm.* v. *U. S.*, 283 U. S. 765, 771, 75 L. Ed. 1397, 1403), but here the report of the Com-

mission is *expressly* "referred to and made a part of" the order (R. 39). Moreover the report clearly shows that the Commission was considering "*schedules filed to become effective May 1 and August 3, 1934,* by which respondents proposed to increase the rates on coke from the Birmingham, Ala., district, hereinafter referred to as Birmingham, and from origins on the lines of the Louisville & Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., and to make reductions and increases in rates from Chattanooga, Tenn., to destinations in Illinois, Indiana, Ohio and the Lower Peninsula of Michigan" (R. 34). The language "to destinations in Illinois, Indiana, Ohio and the Lower Peninsula of Michigan" is exactly the same as that used in the Commission's order in Docket No. 3511, upon which appellants insist they stand (R. 126). Also in the order in Docket No. 3511, prescribing rates for application in Illinois and Central territories, the order says: "Between points in the territories considered in the said report" (R. 128), without designating the points. There, as here, however, the specific points are designated in the report as being the points to which rates are published in the suspended schedules. It is apparent that the contention here made is an afterthought and is without any merit whatsoever.

There is an equal lack of merit in the second contention, which is that the Commission was without authority to prescribe rates for future application in lieu of the suspended rates which the Commission condemned. The statutes quoted by appellant clearly

vest this power in the Commission. We reproduce extracts from the Act as quoted by the appellants on pages 21 and 22 of their brief:

"Thus, the portion of the Act dealing with the suspension of tariffs (Section 15 (7)) provides:

> "'Whenever there shall be filed with the Commission any schedule stating a new * * * rate, * * * the commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate * * * and after full hearing, * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective * * *.'

"Similarly, the section of the Act which gives the Commission its power to prescribe rates, Section 15 (1), provides:

> "'Whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any * * * rate * * * demanded, charged, or collected * * * is or will be unjust or unreasonable or unjustly discriminatory * * * the Commission is hereby authorized and empowered to determine and prescribe what

will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *.'"

It will be seen that the Commission is expressly empowered in a suspension proceeding, such as that here involved, to "enter upon a hearing concerning the lawfulness of such rate * * * and after full hearing * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective * * *." "A proceeding initiated after it had become effective" would be either upon complaint or upon investigation ordered by the Commission itself and Section 15 (1) specifically provides that in such a proceeding "the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * to be thereafter observed in such case * * *."

The Commission Did Not Err in Considering the Effect of Rates on the Movement of Traffic.

It is urged by appellants that the Commission had no right, in a case such as this, to consider the effect of rates on the movement of traffic, and that inasmuch as its conclusion and order are based, at least in part, on such consideration they must be set aside by the Court. The basis for the argument that the Commission was without power to consider the effect upon the movement of traffic is apparently the contention that Section 15-a (2) of the Interstate Commerce Act, which specifically

requires the Commission to consider the effect of rates on the movement of traffic "is only intended to be used in broad revenue cases dealing with the entire body of rates of a large group of carriers or all of the carriers of the country, and not with the rates of a limited number of carriers and on just one commodity" (Br. 57). This novel contention finds no support in the language of the Act itself, which is "in the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of the rates on the movement of traffic * * *."

In support of the contention that there must be read into the Act a condition that it shall apply only "in broad revenue cases dealing with the entire body of rates of a large group of carriers or all of the carriers of the country" appellants rely upon the cases of *U. S.* v. *Louisiana*, 290 U. S. 70, 78 L. Ed. 181; *Florida* v. *U. S.*, 292 U. S. 1, and certain language in the Forty-sixth Annual Report of the Interstate Commerce Commission to the Congress.

The Louisiana case involved the power of the Commission to require the level of intrastate freight rates to be increased to the level of interstate rates prescribed by the Commission in a general case involving the level of all interstate rates. Reliance was there had upon the case of *Florida* v. *U. S.*, 282 U. S. 194, 75 L. Ed. 291, where this Court had set aside an order of the Interstate Commerce Commission as to intrastate rates. Both of these cases arose under the old Section 15-a, which was purely a revenue section and did not

contain the present rule of rate-making, as provided by the amendment. But under the old Section 15-a, in holding that the Florida case had no application, this Court said (290 U. S. 70, 79):

> "A question different from that before us was presented in Florida v. United States, 282 U. S. 194, 75 L. Ed. 291, 51 S. Ct. 119, *supra*. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by section 15-a. The court was careful to point out that the Commission had undertaken to establish a state-wide level of intrastate rates without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce involved."

It will be noted that this Court held that the Florida case was essentially one of undue prejudice against shippers, involving only one railroad and one commodity. We submit that the statement of the Court that "it was not the general revenue proceeding authorized by Section 15-a" is far from a holding by this Court that the provisions of the then Section 15-a were not to be observed by the Interstate Commerce Commission except in a so-called general revenue case. Nor can anything be found in *Florida v. U. S.*, 292 U. S. 1, which was the second consideration

by this Court of that case, that in any way supports the contention that the requirements of Section 15-a are to be observed only in general revenue cases.

It is to be remembered that after the first decision of this Court in the Florida case, the Interstate Commerce Commission held a further hearing and made the finding that the intrastate rates created "unjust discrimination against interstate or foreign commerce" as distinguished between unjust discrimination between persons and localities. Thus the second case was a revenue case and the Commission held that the intrastate rates put a revenue burden upon interstate commerce, and in sustaining the Commissions orders this Court in effect held that the provisions of Section 15-a as changed since the decision in the first Florida case, were applicable, and that properly construed the change had not affected the power of the Commission to regulate intrastate rates. Thus it is that this Court held the provisions of 15-a, as amended, were applicable in a case involving "only one railroad and one commodity."

As to the Forty-sixth Report of the Interstate Commerce Commission to the Congress, the Commission simply asked the Congress to amend Section 15-a as it then stood by eliminating the recapture provisions and providing a new rule for rate-making "to make it clear that in regulating the general level of rates, fares and charges the Commission shall, among other things, be guided by the need for producing, as far as possible, revenues which will be sufficient for the maintenance of an adequate national railway transportation

system, and also to recognize the principle that the railroads may justly earn a surplus in times of prosperity as a safe-guard against deficiency in times of depression." It will be noted that there is here no reference to the provision which Congress put in the amended Section 15-a as to giving consideration "to the effect of rates on the movement of traffic." The reference to "regulating the general level of rates" does not necessarily or at all mean that the rule of rate-making requested should be applied only in cases involving the general level of rates, because in prescribing rates on individual commodities the Commission is likewise regulating the general level of rates.

If the provision in Section 15-a, requiring the Commission to give consideration to the effect on the movement of the traffic, is to have no application except "in broad revenue cases dealing with the entire body of rates of a large group of carriers or all of the carriers of the country" then the other provisions of Section 15-a, among them the provisions requiring the Commission to give consideration "to the need of revenue" of the carriers, likewise have no application except in such cases. It is quite certain that appellants in this case would object to a ruling by this Court that in cases involving the rates on one commodity the Commission should not give any consideration to the revenue needs of the carriers.

Entirely aside from the provisions of Section 15-a, however, the value of the service and the effect upon the movement of traffic have always been matters for consideration in prescribing just and reasonable rates.

In fact the two fundamental considerations have always been "the cost and the value of the service." The value of the service is measured by whether the transportation service adds as much to the value of the product as it costs to ship it and whether commodities will freely move. These principles have been announced and applied over a long period of years, not only by the Interstate Commerce Commission but by this Court. To cite only a few cases we refer to *Covington, etc., Turnpike Co.* v. *Sandford*, 164 U. S. 578; *Smyth* v. *Ames*, 169 U. S. 466; *General Rate Level Investigation, 1933*, 195 I. C. C. 5, 61; *Waste Material Dealers Asso. of Arkansas* v. *C. R. I. & P. Ry. Co.*, 164 I. C. C. 587, 599; *Hansen Packing Co.* v. *B. & O. R. Co.*, 201 I. C. C. 75, 77.

There Is No Merit in the Contention that the Order Is Unlawful Because It Constitutes a Change in the Commission's Previous Rulings.

It is repeatedly alleged in the bill that the scale of rates prescribed by the Commission in the order under attack was the "third successive lower basis prescribed by the Commission" and that as the Commission changed its opinion without additional evidence the order is void. In the first place, it is not true that the order was the "third successive lower basis prescribed by the Commission." The first scale prescribed by the Commission as a maximum scale was higher than the rates previously in effect and while the scale prescribed by the order under attack

is lower than the two scales previously authorized, it is not lower than the rates in effect before the Commission took any action.

However, in prescribing rates for the future the Commission may change the rates as prescribed as often as occasion may require and on the same or additional evidence. The power of the Commission to so change rates for future application and the distinction between this power and the judicial function were clearly defined in the case of *Arizona Grocery Co.* v. *A. T. & S. F. R. Co.*, 284 U. S. 370, 76 L. Ed. 348.

The fact that the findings are inconsistent with the conclusions reached by the Commission in similar cases or with views expressed in reports in the same case do not invalidate the order. In *Western Paper Makers Chemical Co.* v. *U. S.*, 271 U. S. 268, 70 L. Ed. 941, this Court said:

> "The objections as presented here in brief and argument were addressed mainly to the soundness of the reasoning by which the Commission reached its conclusions. It was urged that these are inconsistent with conclusions reached by it in similar cases; that the findings are inconsistent with some views expressed in its reports in this proceeding; that some evidence was improperly considered; and that inferences drawn from some of the evidence were unwarranted. These objections we have no occasion to discuss * * *. In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence" (269).

Statements Made in the Dissenting Opinion Afford No Legal Grounds for Attacking the Order of the Interstate Commerce Commission.

Much reliance is had here upon statements made in the dissenting opinion by Commissioner Meyer. This Court has several times pointed out that reliance cannot be had upon the reasons given or facts found in dissenting opinions to overturn orders of the Commission. In *I. C. C.* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, 55 L. Ed. 448, it was said (251):

> "This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members * * * proceeded upon premises of fact, which, however, cogent they may have been as a matter of original consideration, were not open to be so considered by the court because they were foreclosed by the opinion of the Commission."

In the more recent case of *B. & O. R. Co.* v. *U. S.*, 298 U. S. 349, decided May 18, 1936, this Court stated:

> "The wide difference of opinion among the members may suggest doubt as to some basic findings of fact, but it gives no support to appellants' claim that the commission acted arbitrarily or in excess of powers granted by the Act. The legal effect of the challenged report and order is the

same as if supported by all members of the commission."

It is therefore submitted that under the law, as laid down by this Court, reliance cannot here be had upon a dissenting opinion.

The Order of the Commission Is Not an Attempt to Equalize Disadvantages of Geographical Location, Opportunities or Abilities.

It is contended that the order of the Commission was unreasonable because it sought to equalize disadvantages of fortunes, opportunities, and geographical location. There is nothing in the Commission's report or in the record to support this allegation; in fact, quite the contrary appears. Had the Commission undertaken to equalize disadvantages of geographical locations, opportunities, fortunes or abilities it would have prescribed rates from the South to the North on a lower basis than obtains within the North. The only natural disadvantage under which the southern shippers labor is the fact that they are more distant from the market. Surely nothing is done to equalize this disadvantage when the more distant shipper is required to pay rates made on the same scale as his more favorably located short-haul competitor. It may be contended that in addition to the natural disadvantage of distance the southern shipper also has the disadvantage of adverse transportation conditions, but the Commission found that the traffic here in question moved over the main lines of the railroads reaching

the Ohio River and that all traffic from the South to Central Territory or the Northwest moves over these lines, and further that the revenue net tons per mile of road transported by one of the principal carriers handling this traffic exceeds that of the principal carriers in Central territory (R. 35, 36). These findings of the Commission are amply supported by the record, as we shall later show, and, in fact, the record establishes that the cost of transportation within the South is less per unit of traffic handled than in Central territory. Certainly the Commission cannot fairly be charged with any desire to favor the traffic from the South or to equalize disadvantages of geographical locations because in the light of the evidence above referred to it prescribed rates not lower, distance considered, but the same as obtained in Official Classification territory. The Commission refused and still refuses to equalize the disadvantages of geographical location, opportunities and abilities, and only when confronted by overwhelming evidence did it prescribe an equal basis of rates.

The Oft-Repeated Contention that the Commission Tested These Rates Solely by Rates Applicable Within the North and to Allow Competition in Central Territory Markets Finds No Support in the Record.

It is claimed that the Commission failed to use customary standards of rate-making, that it tested the rate solely by the level of rates applicable within the North and to enable southern shippers to compete

therein. There is no basis for any of these allegations except the conclusion of the pleader and perhaps the dissenting opinion of Mr. Commissioner Meyer (R. 37, 38). These assertions come squarely in conflict with the Commission's own statement of the grounds for its action. The Commission refused to test the rates from the South solely on the level of the rates applicable within the North, but did finally base its conclusion, in large part, on the double consideration of rates voluntarily maintained in the South and rates prescribed by it in the North. After finding that the rates within the South and the rates within the North were on approximately the same level, the Commission prescribed that level for the interterritorial rates. In its first report the Commission failed to give due weight to the fact that the level of the coke rates in the South was approximately the same as in the North (R. 26), but on reconsideration it did give weight to the existence of this fact (R. 35, 36), and prescribed interterritorial rates on the basis prevailing within each of the territories.

In addition to the level of the intraterritorial rates in both territories the Commission, as we have seen, gave consideration to other pertinent facts, such as the level of the rates previously voluntarily maintained and the effect of higher rates on the movement of the traffic.

The Preliminary Findings of Fact Support the Ultimate Finding as to the Reasonableness of the Rates Prescribed.

We therefore have here four preliminary findings of fact upon which the ultimate finding of fact as to the reasonableness of future rates was based and appellants have not been able to show any substantial evidence militating against these findings: (1) That the prescribed rates are not lower than those maintained in the past; (2) that the level of rates in the two territories between which the interterritorial rates were prescribed was approximately the same in each territory and the same as the interterritorial rates prescribed; (3) that the differences in transportation conditions between the haul up to the Ohio River and the haul within Central territory were not sufficiently great to require an increase in the rates for the haul up to the Ohio River; and (4) that rates higher than those prescribed as reasonable maximum rates would further restrict, if not prevent, the movement of coke from the South to Central territory.

While the foregoing preliminary findings of fact sustain the ultimate finding as to the reasonableness of the rates prescribed, yet the finding as to such reasonableness is itself a finding of fact, and if supported by substantial evidence other than the evidence sustaining the preliminary findings, such ultimate finding cannot be set aside by the Court. In *Virginia Ry. Co.* v. *United States, supra,* the Court said (665):

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *I. C. Ry. Co.* v. *I. C. C.*, 206 U. S. 441, 454, 51 L. Ed. 1128, 1133, 27 S. Ct. Rep. 700."

The record before the Commission consists of 582 pages of transcript of oral evidence, together with 83 exhibits, some of which are quite voluminous. This Court cannot be expected to search this record in order to resolve opposing contentions as to what it shows, but it is not necessary to do this in order to ascertain that there is substantial evidence to sustain the Commission's ultimate finding of fact as to the reasonableness of rates for future application.

There Is No Allegation that the Commission Failed to Make Sufficient Findings.

By its assignment of errors to the court below, appellants, for the first time, raised the question as to the sufficiency of the Commission's findings. The only allegation in the bill of any lack of sufficient findings is contained in Section 8, of paragraph 7 of the Bill (R. 13), and relates only to the alleged "conclusion" of the Commission that the basis prescribed in previous orders had become unreasonable. But the Commission was not called upon to make any findings as to its previous orders, and made none. It was only called upon to make necessary findings to support the rates it prescribed for future application. There is there-

fore a total lack of any allegation as to insufficiency of findings and that question is not before the Court.

Although appellants argue at some length that the order of the Commission is void because not supported by sufficient findings, and quote from numerous cases holding that an order will be set aside unless supported by findings of the basic or jurisdictional facts, they no where pointed out what findings are lacking. We have already pointed out the findings that were made and we submit that they are sufficient to support the order.

The Evidence Supports the Finding that the Rates Prescribed Are Substantially the Same as Those Existing Prior to the Time These Proceedings Were Instigated.

The Commission found that the rates it prescribed were substantially on the level of those that had previously been voluntarily maintained many years by the railroads. In the report, on reconsideration, of course the Commission did not undertake to recite all the facts but it said "only such essential facts are repeated here as are deemed necessary" (R. 34).

In its first decision on this record, the Commission sets forth (R. 21, 22 and 23) a revenue test based on the movement to Central territory from Birmingham in 1933 and Chattanooga in 1929, comparing the revenue accruing under the rates then in effect with the revenue that would accrue under Scale 2, which was ultimately prescribed by the Commission.

We call the Court's attention to the fact that these figures show that the revenue which accrued under the

rates actually in effect and voluntarily maintained was only a fraction of 1% more than the revenue that would accrue for the same transportation service under the rates ultimately prescribed by the Commission in the order here under attack.

This Court has held in the case of *Louisville & Nashville R. Co.* v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229, that the voluntary maintenance of rates over a long period of time is in itself substantial evidence to sustain the Commission's order prescribing those rates for future application. No one in this case has undertaken to maintain that these revenue figures given above are not correct.

The Evidence Supports the Finding that the Rates in Southern Territory Are on Substantially the Same Level as Those Prescribed for Application Within Central Freight Association Territory.

The second finding of fact made by the Commission as a basis for its ultimate finding of fact as to the reasonableness of future rates is that the rates on coke in Southern territory are on approximately the same level as the rates prescribed by it for application within C. F. A. territory (R. 35). This finding is sustained not only by the weight of the evidence but *by all* of the evidence. Witness Behring, who testified for the Southern Railway System, tested the southern level of coke rates from Birmingham and Chattanooga to points in the South by using the rates to all southern destinations having a population of over 5,000, and

showed them to average exactly the same as the Column 2 Scale of rates, which was the scale prescribed by the Commission for application within Central territory (Ex. 3, R. 222). The details of this test are set forth by the Commission in its original report herein (R. 34, 35). Witness Ribe, appearing for this intervener, tested the level of the rates from Alabama producing points to the South by applying to the actual movement of coke during the year 1933 the Column 2 Scale, which was the scale applicable in Central territory, and showed that the freight charges thereon would actually have been 6.55% greater under said Scale 2 than under the rates actually in effect and charged (Ex. 63, R. 362). Witness Widell made a similar test of the movement from Chattanooga to Southern territory from January 1, 1933, to March 31, 1934, and showed that the application of Scale 2 to said movement would have increased the freight charges thereon by 16% (Ex. 35, R. 326).

No evidence was offered to contradict the above-cited evidence and therefore the finding of the Commission that the level of rates on coke in the South was substantially the same as the level of rates prescribed by it for application within Central territory is supported by all of the evidence.

The Evidence Supports the Commission's Finding that Transportation Conditions in Southern Territory, Insofar as the Movement of This Commodity is Concerned, Are Not so Substantially Different From Those in Central Territory as to Justify Higher Rates.

The Commission made definite findings of fact with respect to the question of transportation conditions. It found (R. 36) that coke from the South moved to the Ohio River over the main lines of the carriers reaching said river and that all traffic from the South to Central Territory and the Northwest moves over those lines.

The evidence clearly supported these conclusions and was covered in three exhibits, namely Nos. 70, 71 and 90.

Exhibits Nos. 70 and 71 were introduced by Witness Ribe: 70 shows (1) tons of coke originated by Class One southern carriers; (2) southern carriers reaching southern coke ovens (designated by an "*"), and (3) southern carriers forming reasonably direct routes from coke ovens in Alabama and Chattanooga to the Ohio River (designated with an "o"). The latter carriers are the A. G. S., C. N. O. & T. P., I. C., M. & O., and N. C. & St. L.

Exhibit No. 71 shows that according to a study made by the Commission's Bureau of Statistics and reported in its Statement No. 3120, the cost of handling a car for an average haul of 300 miles is less in the Southern region and on the individual southern roads having reasonably direct routes from southern

coke ovens to the Ohio River, as above named, than in the Eastern district on both gross ton-mile basis and loaded car-mile basis, except (1) that L. & N. cost on loaded car-mile basis is higher than the Eastern District average, and (2) that N. C. & St. L. cost on gross ton-mile basis is higher than the Eastern District average.

Further, it was pointed out (R. 405, 406) that the movements up to the Ohio River are divided, namely, one-half in Tennessee and one-half in Kentucky when from Chattanooga; and one-third in Northern Alabama, one-third in Tennessee and one-third in Kentucky when from Birmingham; and that the traffic density in Kentucky is greater than in Ohio, Indiana, Michigan, Illinois and Wisconsin; and that the traffic density in Tennessee exceeds that in Wisconsin and Michigan, north of Zone A, and is practically the same as in the State of Illinois.

Mr. Behring, for the Southern Railway, testified (R. 238, 239) that the transportation conditions from Chattanooga and Birmingham to the Ohio River were as favorable as those within Central territory, and that the service between Chattanooga and Birmingham and the Ohio River was better than anywhere else in the South or North (R. 240).

Much other evidence as to transportation conditions may be found in the record, but the foregoing is certainly sufficient to constitute substantial evidence of the finding made by the Commission that the transportation conditions affecting coke moving from these southern points are not so substantially

more difficult than those obtaining in Central territory as to justify higher rates.

The Finding of the Commission that Rates Higher Than Those Prescribed Would Restrict, If Not Prevent, the Movement of the Traffic, Is Supported by the Evidence.

We have already discussed the question of the right of the Commission in prescribing just and reasonable rates to consider the effect upon the movement of the traffic, and have shown that the Commission is not only required by Section 15-a (2) to give consideration thereto, but that it has long been established that, irrespective of the statutory requirement, value of service or effect upon movement of traffic is a prime consideration in determining just and reasonable rates.

The finding of the Commission here is as follows:

> "The southern carriers are convinced that any rates higher than the column 2 rates would further restrict, if not prevent, the movement of coke from the South to Central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect" (R. 35).

Little can be added to the statement of the Commission that the evidence of the Chattanooga and Birmingham producers, that rates higher than Column 2 rates would further restrict if not prevent the movement of coke from the South to Central territory was not rebutted. There is no claim by appellants

that this evidence was in any way contradicted but the insistence simply is that the Commission erred in considering the matter at all.

CONCLUSION.

Each of the grounds of attack on the order of the Commission, as made by appellants, has been discussed in the foregoing brief and shown to be without justification in law or on the record. Appellants here sought to set up a freight tariff barrier between sections of the country and the Interstate Commerce Commission, by its order, struck down the barrier by prescribing reasonable rates. In doing so that Commission exercised powers specifically vested in it, and its order, being supported by substantial evidence and made after notice and hearing, and there being no irregularity in the proceeding nor error in the application of the rules of law, must be sustained.

It is therefore respectfully submitted that the decree of the District Court, dismissing the bill of complaint, should be affirmed.

Respectfully submitted,

J. V. NORMAN,
Counsel for Alabama Iron & Steel Shippers Conference, Appellee.

HUGH WHITE,
Of Counsel.

Dated at:
Louisville, Ky.,
March 17, 1938.

APPENDIX.

PERTINENT PARTS OF STATUTES REFERRED TO HEREIN.

SEC. 3 (*As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935*) (*U. S. Code, title 49, sec. 3*). (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 15 (*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935*) (*U. S. Code, title 49, sec. 15*). (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in

violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or prac-

tice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts are paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this part, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15a (*Added February 28, 1920; amended June 16, 1933*) (*U. S. Code, title 49, sec. 15a*). (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

SEC. 16a (*Added June 29, 1906*) (*U. S. Code, title 49, sec. 16a*). That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 638.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
APPELLANTS,

versus

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.,
APPELLEES.

BRIEF FOR CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY ET AL., APPELLEES.

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March 21, 1938.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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1. OPINION OF THE COURT BELOW.

The findings of fact and conclusions of law of the specially constituted District Court appear in the record at pages 161-168. (There was no opinion by the lower Court.)

2. STATEMENT OF THE CASE.

This is an appeal, under the Urgent Deficiencies Act, of October 22, 1913, Chapter 38, Stat. L., 208, 220, from a final decree of the United States District Court for the Northern District of Illinois, Eastern Division (Circuit Judge Evans and District Judges Woodward and Barnes) entered January 21, 1937 (R. 185-186).

The decree was rendered upon a bill (R. 1-15) brought by The Baltimore & Ohio Railroad Company *et al.*, against The United States of America and Interstate Commerce Commission.

The purpose of the bill was to enjoin an order of the Interstate Commerce Commission entered March 11, 1935 (R. 32, 33), and a further order of the Interstate Commerce Commission entered April 30, 1936 (R. 39, 40), whereby the Commission prescribed rates on coke from producing points in the South to destinations in Illinois, Indiana, Ohio and the lower peninsula of Michigan. Certain manufacturers and shippers of coke from producing points in the North intervened in support of the plaintiffs (R. 146-157).

The Cincinnati, New Orleans & Texas Pacific Railway Company, Illinois Central Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville and Nashville Railroad Company, operating in Southern territory, intervened in behalf of the defendants (R. 141-144). The Alabama Iron and Steel Shippers Conference, and associations of manufacturers, producers and shippers of certain commodities, in-

cluding the manufacture and shipment of coke, likewise intervened in behalf of the defendants (R. 144-146).

The District Court denied the injunction prayed for and dismissed the bill (R. 185-186).

3. THE ORDERS COMPLAINED OF BY APPELLANTS.

The orders complained of by the appellants were made by the Commission in the proceeding entitled, "Investigation & Suspension Docket No. 3985, *Coke From Alabama and Tennessee to Central Territory,*" reported in 208 I. C. C. 281 (R. 15-32), and 215 I. C. C. 384 (R. 33-38, Report on Reconsideration). The order of April 30, 1936, was entered by the Commission upon reconsideration of its report and order of March 11, 1935, and thus became substituted for the order of March 11, 1935, and is the only final outstanding order now in effect as result of said proceeding before the Commission.

4. HISTORY OF THE PROCEEDINGS BEFORE THE COMMISSION.

It will be helpful to present an historical background of the Commission's orders of March 11, 1935, and April 30, 1936, as appears from the reports of the Commission. An earlier case, dealing extensively with rates in Northern territory and with rates from Southern producing points to Northern territory, will be found reported in 194 I. C. C. 640 (R. 42-107), decided

on June 30, 1933. That case was entitled, "Investigation & Suspension Docket No. 3511, *Coke Between Points in Central and Illinois Territories,*" but there had been consolidated with that proceeding a number of complaints that had been filed by producers of coke in Northern territory, bringing in issue the reasonableness of their rates and relationship between rates prevailing in that territory and the rates from Southern producing points to Northern territory; also a complaint by producers of coke in the South, bringing in issue the reasonableness of the rates on coke from the South to the North, and the relationship to rates prevailing in the North.

After extensive hearings, the Commission made and entered its report and orders in that consolidated proceeding, 194 I. C. C. 640 (R. 42-107). In that case the Commission prescribed a mileage scale of rates for application on coke in the North. It found certain of the rates on coke from the South to be unreasonable, and by order required that rates from Southern producing points be reduced so as not to exceed a certain other mileage scale. Those two scales appear as Appendix 8 to the report of the Commission in 194 I. C. C. 640 (R. 42-107). The scale ordered applicable in the North is known as the Column 2 scale. The scale, which the carriers were required to observe as maximum from the South, is known as the Column 3 scale.

Following the orders in that proceeding, the carriers in Northern territory established for application on coke within that territory the Column 2 basis of rates, with certain exceptions (R. 17, 18). The car-

riers in the South revised their rates from the South to the North in instances where the rates from the South to the North exceeded the scale prescribed by the Commission, but made no change in rates which were lower than the Column 3 scale (R. 18, 34). Almost immediately thereafter some of the railroads operating lines in the North, and participating in the transportation of coke from the South to the North, demanded of lines operating in the South that they increase all of the rates applicable on coke from the South to the North to the basis of the Column 3 scale. Believing that this would result in establishing and maintaining a level of rates that would seriously obstruct the movement of coke from the South to the North (R. 18, 35), and thus deprive them of the substantial revenue which they were earning on such coke traffic, the Southern lines declined so to advance their rates (R. 18), not being required so to do by any order of the Interstate Commerce Commission. Seeking to compel compliance with their demands, some of the Northern lines undertook to cancel the concurrences under which Southern lines had been authorized to publish rates on coke to Northern destinations, in connection with such Northern lines, and issued new concurrences authorizing the establishment and maintenance of rates in connection with such lines only on condition that the rates be made on basis of the Column 3 scale (R. 18, 35). While this was unsatisfactory to the Southern lines, they felt compelled to respect the directions contained in the new concurrences issued to them, and tariffs were filed publishing the rates from the South to the

North on the Column 3 basis. However, in filing the tariffs with the Commission, the Southern lines and Southern shippers filed protests with the Interstate Commerce Commission and petitioned it to suspend the tariffs (R. 16).

The Commission suspended the rates, and such suspension proceeding became "Investigation & Suspension Docket 3985, *Coke from Alabama and Tennessee to Central Territory*" (R. 15, 16), in which proceeding the orders of March 11, 1935, and April 30, 1936, sought to be set aside in this case, were made and entered.

The Commission conducted an extended hearing in I. & S. Docket 3985. At that hearing the Northern and Southern railroads, and Northern and Southern producers and shippers of coke, appeared and introduced testimony (R. 202-414). In fact, all parties desiring to be heard were fully heard by the Commission. Briefs were filed and the case was orally argued by all interested parties (R. 417-509). Thereafter, the Commission on March 11, 1935, issued a report and made a certain order. This report and order were not satisfactory to the Southern railroads or the Southern producers of coke. In and by it, the Commission *permitted* the establishment of a basis or level of rates that was higher than the basis or level of rates that prevailed in Northern territory (R. 15-33). On petition of several protestants, the protestants being producers, shippers and carriers in the South, to which petitions replies were filed with the Commission by the Northern railroads, the proceeding was reopened for

reconsideration, as authorized by the Commission's Rules of Practice made pursuant to authority conferred upon it by Section 16a of the Interstate Commerce Act (34 Stat. L. 592), on the record as already made before the Commission. Neither the Southern petitioners, nor the Northern railroads or producers, petitioned the Commission for any further hearing at which new or additional testimony could be introduced.

On reconsideration, the Commission found (R. 33-38) that rates on coke in carloads from Southern producing districts to destinations in Illinois, Indiana, Ohio and the lower Peninsula of Michigan "for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix" (R. 37) thereto, which scale is the same as the Column 2 scale in Appendix 8 to the report of the Commission in 194 I. C. C. 460 (R. 42-107), and the Commission made and entered its order of April 30, 1936, to give effect to this ultimate finding (R. 39, 40). The validity of this order is here brought in issue.

SUMMARY OF ARGUMENT.

I.

Before making its order of April 30, 1936 in which the rates here involved were prescribed, the Commission afforded all parties an opportunity to be heard, and all interested parties were accorded a full and complete hearing as provided by law.

That order did not condemn rates to points which were not before the Commission.

II.

The rates prescribed by the Commission in such order of April 30, 1936 were not lower than reasonable maxima.

III.

The order of April 30, 1936 is a valid order. It is supported by substantial evidence, and therefore is conclusive.

The basis of rates therein prescribed on coke for application from southern origins to northern destinations is on the same level as that which prevails generally both in the South and in the North on this commodity, the prevailing rates thereon in the South and in the North having been in evidence before the Commission.

The evidence before the Commission also disclosed that the involved traffic moves only over the main lines of southern railroads, and therefore under favorable transportation conditions.

Any higher rates than those prescribed would have obstructed the movement from southern origins to northern destinations.

IV.

The reductions which the Commission's order of April 30, 1936 brought about were in no sense drastic. They reduced the revenues of the carriers involved, based on tests presented in evidence before the Com-

mission, less than two-tenths of one per cent, and thus substantially preserved the revenues of the carriers obtained under the pre-existing rates.

V.

The weight to be accorded the evidence presented to the Commission is a matter peculiarly for the Commission's determination.

ARGUMENT.

I.

Before Making the Order of April 30, 1936, All Parties Were Accorded a Full and Complete Hearing.

It is urged that the District Court erred in failing to find that the Commission's order of April 30, 1936 was arbitrary and unlawful, in that, as claimed, it was made without having taken or heard any evidence or facts, but made solely on petitions or pleadings on the record as already made, and thus denied petitioners the hearing provided by law. There is no contention that the Commission did not grant a full and complete hearing in *Investigation & Suspension Docket 3985,* which first resulted in the report and order of March 11, 1935. The only contention is that, after that decision was made, Southern carriers and shippers petitioned the Commission, as provided for in Rule 15 of the Commission's Rules of Practice (printed as Appendix A of this brief), established by the Commission pursuant to the provisions of Section 16a of the Inter-

state Commerce Act to the effect that "applications for rehearing shall be governed by such general rules as the Commission may establish." That rule provides that an application for rehearing, reargument or reconsideration, after decision, must be made by petition stating specifically the grounds relied upon, filed with the Commission and all parties or attorneys who appeared. Paragraph (c) of the same rule requires that the matters claimed to have been erroneously decided must be specified and the alleged errors specifically stated. The petitions of Southern carriers and shippers were filed under and in compliance with Paragraphs (a) and (c) of Rule 15. Northern carriers and Northern producers filed replies to those petitions. Neither in the petitions filed by the Southern carriers and shippers for rehearing or reconsideration, nor in the replies filed by the Northern carriers and Northern shippers, was any request made upon the Commission, as required by Paragraph (b) of Rule 15, by any party to reopen the proceeding to take further evidence. Such procedure is specifically dealt with in Paragraph (b) of Rule 15, by providing that, if the application be for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and must appear not to be cumulative. None of the parties having met the specifications of Paragraph (b) of Rule 15, the Commission was not required, under the law or its Rules of Practice, to reopen the case for the taking of additional testimony. As found by the District Court, "by order of April 15, 1936 the Commis-

sion reopened said proceeding for reconsideration on the record as it then stood" (R. 164). It clearly appears from the petitions and replies filed thereto that all parties were content to have the case finally determined upon the record before the Commission as it then stood, and the record here shows no protest or objection of any party to the Commission's order of April 15, 1936, by which it "reopened said proceeding for reconsideration on the record as it then stood." It is obvious, therefore, that the contention that the order of April 30, 1936 was made without hearing or that in making said order the Commission denied to the appellants here any hearing provided by law is wholly lacking in merit. Of them it may be said, as was said of the carriers in *United States* v. *Northern Pacific Ry.*, 288 U. S. 490, 494:

> "They sat silent and took the chance of a favorable decision on the record as made."

But it is further argued that the order of April 30, 1936 required reductions in *every* coke rate from the Southern manufacturing points to *every* destination in Central territory. But the order does not so read or require. In general terms it requires that the Column 2 rates be established to destinations (not necessarily all destinations) in Central territory, and by making its report a part of the order this general term became definite and specific by tying in with the specific rates, under suspension in I. & S. Docket 3985. It results, therefore, that the order did not condemn rates to points not involved in the suspended schedules.

II.

The Rates Prescribed by the Commission Were Not Lower Than Reasonable Maxima.

It is contended that the District Court erred in failing to find that the Commission, without lawful power or authority, required appellants to join Southern carriers in rates made lower than reasonable maxima, in order to enable Southern producers of coke better to compete with producers in the North. The Commission's order of April 30, 1936 was made to effectuate the command contained in Paragraph (5) of Section 1 of the Interstate Commerce Act (24 Stat. L. 379; 34 Stat. L. 584; 36 Stat. L. 544; 41 Stat. L. 474; 48 Stat. L. 1102). That paragraph requires that all charges made for any service rendered or to be rendered in the transportation of property shall be just and reasonable, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. The Commission's finding was made under this statutory obligation. It may be conceded that the Commission was equally mindful of the duty imposed upon it by the Congress in Paragraph (2) of Section 15a of the Act, which is that, in the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic. That is to say, what the Commission did was to prescribe maximum reasonable rates as found by it under the requirements of Paragraph (5) of Section 1 and

Paragraph (2) of Section 15a of the Interstate Commerce Act (48 Stat. L. 220). The mere fact that the rates prescribed by the Commission may have promoted competition or have enabled competition, which already existed, to continue surely is not sufficient to stamp such rates as lower than reasonable maxima, or otherwise to limit or restrict in any way the Commission in its exercise of informed judgment in prescribing maximum just and reasonable rates. Obviously, in view of the language of Section 15a, it was not the intention that the Act should be so administered as to obstruct the movement of traffic or destroy competition.

The validity of such a finding by the Commission is not affected, as appellants insist, by arguments or conclusions of counsel or others participating in the conduct of the proceeding before the Commission. The finding of the Commission was properly based *on the evidence* in the record, and is fully supported by substantial evidence of record, as will be shown in the next section of this brief.

A somewhat similar contention was made in *Virginian Railway Co.* v. *United States,* 272 U. S. 658. Dealing with such a contention there, this Court, at pages 665, 666, said:

> "The Virginian contends that the evidence before the Commission does not support its finding that the rates on coal from the Virginian's mines *via* the Chesapeake & Ohio are unreasonable to the extent that they exceed the New River district rates maintained by the latter carrier from mines

on its own and connecting lines having no other outlet to the western markets. The argument is that these rates can not be considered standards of reasonableness because, as the Commission declared in the present controversy, they are 'the outcome of competitive strain and stress through long periods of development,' and, as it had stated in an earlier case, they have been made 'in practical, if not absolute, disregard of distance, and all transportation conditions that ordinarily are taken into consideration in the making of rates,' and 'are below the level at which maximum reasonable rates might be maintained.' *Bituminous Coal to C. F. A. Territory,* 46 I. C. C. 66, 122, 145. The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454. This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistentcy with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541. It was shown that a huge coal traffic moves from this territory, under like operating conditions, at the blanket rates which were voluntarily established by the other carriers to serve mines similarly located. This fact, and much else in the voluminous record, afford substantive evidence to support the finding that the existing rates are unreasonable; and that those which the order directs are reasonable."

Thus in the Virginian Railway case the Court refused to disturb a finding of the Commission in which it applied, as a standard to determine maximum reasonable rates, other rates which were "the outcome of competitive strain and stress through long periods of development."

III.

The Findings and Order of the Commission Are Supported by Substantial Evidence and Are Valid.

The question determined by the findings and orders of the Commission, of which complaint is here made, is in its finality whether the rates prescribed by the Commission are just and reasonable rates under the law. It is a question on which the finding of the Commission is conclusive, if supported by substantial evidence.

Illinois Central Railroad Co. v. *United States,* 206 U. S. 441;

Interstate Commerce Commission v. *Union Pacific R. R. Co.,* 222 U. S. 541;

Louisville & Nashville R. R. Co. v. *United States,* 238 U. S. 1;

Skinner & Eddy Corporation v. *United States,* 249 U. S. 557;

Western Paper Makers' Chemical Co. et al. v. *United States,* 271 U. S. 268;

Virginian Railway Co. v. *United States,* 272 U. S. 658;

Chicago, Rock Island & Pacific Ry. Co. v. *United States,* 274 U. S. 29;

Florida v. *United States*, 292 U. S. 1;
Mississippi Valley Barge Line Co. v. *United States*, 292 U. S. 282;
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38.

Appellants contend that the orders are arbitrary and unjust, contrary to the evidence of record, without support of any substantial evidence properly before the Commission, and against the indisputable character of, and the manifest weight of, the evidence. In short, the question with which the Court is concerned is whether or not there was substantial evidence to support the Commission's findings and orders. As said in the *Illinois Central case, supra,* the finding of reasonableness is a determination of a fact by a tribunal "informed by experience." And in the *Union Pacific case, supra,* "This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." It is only concerned with the question as to whether the finding and order of the Commission were based upon substantial evidence to be found in the record before the Commission. On this narrow question, no difficulty will be encountered here, such substantial evidence is to be found in the reports of the Commission which only briefly summarize the more controlling facts to be found in the large record made before the Commission (R. 15-32, 33-38, 42-107).

The matter before the Commission for determination was that of a just and reasonable level of rates to be applied for the transportation of coke in interterritorial movements from producing points in the South to consuming points in the North. In the case reported in 194 I. C. C. 640 (R. 42-107), the Commission itself had prescribed a scale of rates for application within Northern territory. While the Commission had prescribed no scale for application in Southern territory, its report (R. 15-32) describes and analyzes in great detail the rate level on coke prevailing in Southern territory, as result of voluntary action on the part of the carriers. It found that the rates from Chattanooga, Birmingham and Wise County, Virginia, the three producing districts involved, to Southern destinations, are in certain instances slightly higher and in other instances lower than they would have been if made on the Column 2 basis, *i. e.,* the basis which the Commission itself prescribed for application in Northern territory, but that they averaged about the same. It found that from Chattanooga and Birmingham combined, to all destinations in Southern territory, having a population of 5,000 or more, both the present and the Column 2 rates averaged $2.96 per ton; that is to say, the Commission found the fact to be that the rate level prevailing in the South was, considered as a whole, identically the same as that prevailing in the North. What better evidence could there be, upon which to determine a just and reasonable level of rates for interterritorial application to apply on interterritorial movements of coke, than evi-

dence of the rate level prevailing intraterritorially in the two respective territories? This alone would constitute substantial evidence to support the findings and orders of the Commission.

Appellants argue that the Commission failed to test the rates by the usual standards, but tested them only by rates applicable in the North. But this contention is squarely in the face of findings contained in the Commission's reports to the contrary, as just shown. It tested the interterritorial rates, not merely by rates applicable within the North, but as well by the rates applicable within the South.

In its Report on Reconsideration of April 30, 1936 (R. 33), in justifying a finding, conclusion and order in that report somewhat different from its report of March 11, 1935, the Commission, after again discussing and reconsidering what was said in its prior report as to certain transportation and traffic density matters, said:

> "Too much weight was given in the prior report to the absence of the specific data referred to, and not enough to the established rate adjustments in Southern and Central territories and the effect rates have on the interterritorial movement of the traffic." (215 I. C. C. 384, 386)

Thus it will be seen that the Commission gave, as it should have done, great weight to the established rate adjustments in both Southern and Central territories. It would have been somewhat novel, to say the least, had the Commission found justification for an inter-

territorial rate level higher than the rate levels in the origin or destination territories, one having been prescribed by the Commission and the other voluntarily maintained by the carriers for many years.

The Commission also had before it, as its reports (R. 15-32, 33-38) show, transportation and traffic data. It found that the movement of coke, produced in the South destined to Northern consuming points, was over main lines only of Southern railroads (R. 19, 35, 36). It had before it, as its reports show, evidence of the need for the Column 2 basis of rates, so as not to obstruct the interterritorial movement of traffic (R. 35), in order that the requirement contained in Paragraph (2) of Section 15a of the Act might be met.

IV.

The Order of the Commission Did Not Require Drastic Reductions in the Involved Rates.

Appellants argue that the order of the Commission required drastic reductions in the level of interterritorial rates. But such is not the case. The Column 2 basis of rates made effective under the Commission's order of April 30, 1936 did have the effect of reducing to a slight extent rates from the Birmingham district, but it resulted in substantial increases in many of the more important rates from the Chattanooga district, as appears from the table on page 285 of the Commission's report in 208 I. C. C. (R. 20). The effect of the Column 2 basis of rates on the revenues of the carriers,

both Northern and Southern, based on all shipments of coke moving during the year 1933 from the Birmingham district to points in the states of Illinois, Indiana, Ohio and Michigan, and during the year 1929 on all coke shipments made from Chattanooga to points in those four states, was to reduce the revenue on shipments from the Birmingham district from $508,135.32 to $484,974.97, a reduction of $23,160.35; whereas, with respect to Chattanooga, the Column 2 basis of rates resulted in an increase in revenue from $206,744.24 to $228,791.07, an increase of $22,046.83* (R. 22, 23). Combining the shipments from Birmingham and Chattanooga to destinations in the four states named, the reduction in revenue resulting from the Column 2 basis of rates, as applied to the 1933 movement from Birmingham, and the 1929 movement from Chattanooga, was only $1,113.52* (R. 22, 23). Thus it appears that, on the whole, the effect of the Column 2 basis of rates, prescribed by the Commission, was to reduce by less than two-tenths of one per cent the amount of revenue which would have been earned on the basis of rates then in effect and which had been voluntarily maintained for some years prior to the inauguration of efforts on the part of the Northern lines in 1934 to bring about increases in rates from

*While the revenue shown on the traffic from Birmingham is based on the rates which became effective March 15, 1934, following the decision of the Commission in *Coke Between Points in Central and Illinois Territories*, 194 I. C. C. 640, the revenue shown on the traffic from Chattanooga is based on rates in effect prior to March 15, 1934. Some reductions in the rates from Chattanooga concurrent with the changes made from Birmingham effective March 15, 1934, were made "to eliminate fourth-section departures" (R. 18), so that the figures shown understate, to some extent, the increase in revenue from Chattanooga, and overstate the net reduction caused by the order.

Southern producing points to the North. The fact that the rates prescribed by the Commission approximately preserved the then existing revenues of the carriers is significant as indicating the absence of any drastic action on the part of the Commission.

V.

The Weight to be Given the Evidence is for the Commission's Determination.

The weight to be given this evidence, summarized by the Commission in its report from the record before it, is a matter peculiarly for the Commission to determine, for it is well settled that, if the determination of the Commission finds substantial support in the evidence, the Courts will not weigh the evidence, nor consider the wisdom of the Commission's action.

CONCLUSION.

It is clear from this evidence summarized from the reports of the Commission, without additionally searching the voluminous record made before the Commission, that the Commission's findings and orders are fully supported by substantial evidence, are not arbitrary, unjust or contrary to the evidence of record, and are valid.

The decree of the District Court accordingly should be affirmed.

Respectfully submitted,

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March 21, 1938.

APPENDIX "A"

"XV. APPLICATIONS FOR FURTHER HEARINGS, REHEARINGS, REARGUMENTS, RECONSIDERATION, OR MODIFICATION OF ORDERS.

"(a) (Petition; filing; service.) An application for further hearing in a proceeding before final submission, for reopening a proceeding after final submission, or for rehearing, reargument, or reconsideration after decision, must be made by petition, stating specifically the grounds relied upon, filed with the commission and served by the petitioner upon all parties or attorneys who appeared at the hearing, or oral argument if had, or on brief.

"(b) (Further hearing or reopening; statement as to new evidence.) If the application be for further hearing before final submission, or for reopening the proceeding to take further evidence, the nature and purpose of the evidence to be adduced must be briefly stated and it must appear not to be merely cumulative.

"(c) (Rehearing, reargument, or reconsideration, specification of errors.) If the application be for rehearing, reargument, or reconsideration, the matters claimed to have been erroneously decided must be specified and the alleged errors briefly stated. If thereby any order of the commission is sought to be vacated, reversed, or modified by reason of matters which have arisen since the hearing, or of consequences which would result from compliance therewith, the matters relied upon by the petitioner must be fully set forth in the petition."

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No. 638

In the Supreme Court of the United States

OCTOBER TERM, 1937

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.,
APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

MARCH 1938.

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 638

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The specially-constituted District Court announced its decision from the bench at the conclusion of the argument (R. 613), and made findings of fact and conclusions of law (R. 161–168), without rendering a written opinion.

The reports of the Commission in *Coke from Alabama and Tennessee to Central Territory*

(R. 15–32; 33–38, 158–160), are published in 208 I. C. C. 281, 215 I. C. C. 384, and 219 I. C. C. 425.

An earlier report, dated June 30, 1933, in a related proceeding, entitled *Coke between Points in Central and Illinois Territories,* (R. 42–107), is reported in 194 I. C. C. 640.

JURISDICTION

The decree of the District Court was entered January 21, 1937. (R. 185–186) Petition for appeal was filed and allowed March 17, 1937. (R. 187, 193)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C., sec. 47), as amended by Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (28 U. S. C., sec. 345).

QUESTIONS PRESENTED

The principal question involved is the validity of the Commission's order of April 30, 1936 (R. 39), prescribing a scale of distance rates for application from Birmingham, Ala., Chattanooga, Tenn., and Wise County, Va., to destinations in Illinois, Indiana, Ohio, and the lower peninsula of Michigan.

The particular questions presented are:

I. Whether the order was made without notice and hearing.

II. Whether the order is supported by substantial evidence.

III. Whether the order is contrary to the manifest weight and the indisputable character of the evidence.

IV. Whether the order attempts "to equalize geographical and transportation disadvantages, fortune, opportunities or abilities."

V. Whether the Commission "proceeded under erroneous constructions of law and misapprehensions in respect of its powers, in testing the interterritorial rates from the South by the level of rates applicable within central territory, instead of employing ordinary and well-recognized standards of rate determination."

VI. Whether the order is supported by necessary findings.

STATUTES

Pertinent provisions of the Interstate Commerce Act are printed in the Appendix, *infra,* pages 81–89.

STATEMENT

Proceedings before the Commission

The proceeding *Coke from Alabama and Tennessee to Central Territory, supra,* I. & S. 3985, was a continuation of the controversy between northern railroads and northern coke shippers, on the one hand, and railroads and coke shippers in the South, on the other hand, regarding the rate structure on coke within central territory and interterritorially from the South to central territory, which was considered by Division 4 of the Commission (Commissioners Meyer, Eastman and Ma-

haffie) in *Coke between Points in Central and Illinois Territories*, 194 I. C. C. 640, decided June 30, 1933.[1]

That proceeding was begun by a formal complaint filed under section 13 (1)[2] by the Alabama By-Products Corporation et al. against the Louisville & Nashville R. R. Co. et al., Docket No. 22052, alleging that the rates on coke[3] from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to destinations in Illinois, Indiana, Ohio, and the southern peninsula of Michigan were unreasonable, in violation of section 1 (5), and unduly prejudicial as compared with the rates accorded their competitors located at Chattanooga, Tenn., and at various origins in central territory, in violation of section 3 (1). (R. 45) Shortly thereafter six other formal complaints were filed which put in issue

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[1] Central territory is roughly described as lying north of the Ohio River, west of a line drawn through Buffalo, N. Y., Pittsburgh, Pa., and Wheeling, W. Va., and east of the Mississippi River from Cairo, Ill., to approximately Burlington, Iowa. It does not embrace that part of Illinois lying north of a line extending northeasterly from Burlington to Chicago. See maps, 31 I. C. C. 350, 45 I. C. C. 302, and *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 351–352.

Illinois Freight Association Territory embraces the entire State of Illinois, points on the west bank of the Mississippi River opposite that State, and points in southern Wisconsin south of a line from Milwaukee through Watertown to Madison and thence through Dodgeville to the Mississippi River north of Dubuque, Iowa. (140 I. C. C. 227, 229.)

[2] Unless otherwise indicated, all sections referred to herein are provisions of the Interstate Commerce Act, part I.

[3] All rates referred to herein are carload rates.

inter alia the reasonableness under section 1 (5) of coke rates within central and Illinois territories and the relation, under section 3 (1), between the coke rates in central territory, on the one hand, and rates from Birmingham and Chattanooga to destinations in central territory, on the other hand. Northern shippers alleged that they were subjected to undue prejudice by the relation between their rates to given destinations in central territory and the rates from the South to the same destinations, to the undue preference of the southern shippers, and, conversely, southern shippers alleged that this rate relation unduly preferred northern shippers and unduly prejudiced the southern shippers. About the same time the carriers proposed revised rates on coke in central and Illinois territories; these rates were suspended by the Commission, under section 15 (7), and an investigation instituted as to their lawfulness, I. & S. Docket No. 3511.

All these proceedings were consolidated and were decided by Division 4 of the Commission in the above-mentioned report, in which Division 4 prescribed a scale of distance rates on coke as maximum reasonable rates for application within central territory. This scale, set forth in Column 2 of Appendix 8 of the report therein (R. 107), is designated as the *Column 2* scale. This scale begins with a rate of 90 cents per ton for distances of 10 miles and under and progresses gradually to $4.75 per ton for distances of 800 miles and over 770. In

the same proceeding Division 4 also prescribed a scale of distance rates as maximum reasonable rates for application from Dolcito Junction, Alabama City, Holt, and Woodward, Ala., to points in central territory. This scale, designated as the *Column 3* scale, was approximately 10% higher than the Column 2 scale.[4]

Division 4 found that none of the rates in issue caused undue prejudice and expressed the view that if any undue prejudice existed it would be corrected by the establishment of the scales prescribed. (R. 85)

The order of June 30, 1933, in that proceeding (R. 108, 125–126) required that rates not in excess of the Column 2 and Column 3 scales be established and made effective on or before September 15, 1933. By subsequent orders this effective date was extended to March 15, 1934. (R. 163)

At the time of the issuance of this order many of the existing rates in central territory were higher than the prescribed Column 2 scale and many were lower. Although the order of Division 4 did not require any increases—merely prescribing the scales as maxima—the central territory carriers decided to revise all their rates in central territory so as to put them exactly on the scale, and accordingly they reduced all rates in excess of the scale and increased

[4] No coke is now manufactured at Alabama City or Holt. Woodward and Dolcito Junction are in the Birmingham district, take Birmingham rates, and are hereinafter collectively called Birmingham. (R. 16)

all that were below the scale, and made the revised rates effective March 15, 1934. (R. 17–18, 163)[5]

Many of the interterritorial rates from the South to central territory were higher than the Column 3 rates and many were lower. (R. 18, 163) These interterritoral rates, applicable jointly over the lines of southern and central territory carriers, were published by the southern carries under concurrences previously given to them by the central territory carriers. (R. 163)

After the issuance of the order of June 30, 1933, the southern carriers established and made effective March 15, 1934, reductions in all interritorial rates from Birmingham to destinations in central territory that were higher than the Column 3 scale, but did not increase any of the then-existing rates that were lower than the Column 3 rates. (R. 163) They were of the view that the Column 3 rates were too high, and since the order did not require any increases (it was not a minimum rate order) but merely prescribed Column 3 as *maxima,* they left in

[5] There were some exceptions. Intrastate in Ohio the scale prescribed by the State Commission applies. That scale is slightly lower up to 40 miles and the same beyond that distance as the Column 2 rates. The Illinois carriers did not publish the Column 2 rates on the ground that their rates then in effect did not differ sufficiently from the Column 2 rates to warrant the expense of publishing new tariffs. They intend to establish the Column 2 rates the first time new tariffs are published. About 57 short-haul rates, mostly for distances under 30 miles, lower than Column 2 rates, have been established in central territory to meet truck competition. (R. 17)

effect without change all rates that were lower than Column 3. (R. 34, 163)

The reductions in the rates from Birmingham required reductions in some of the rates from Chattanooga, an intermediate point, in order to avoid violations of the long-and-short-haul clause of section 4. Accordingly, wherever the Column 3 rate from Birmingham was lower than the rate from Chattanooga to a given destination in central territory, the rate from Chattanooga was reduced to the same level as that from Birmingham. These revised rates from Chattanooga, like those from Birmingham and within central territory, became effective March 15, 1934. (R. 18, 163)

Coke rates from Wise County, Va., were not involved in I. & S. 3511. The order in that proceeding required no changes in those rates, and none was made. (R. 18)

Pressure was brought to bear on the carriers in central territory by producers therein to increase all rates from southern origins to central territory to the Column 3 basis. The southern carriers were opposed to such increases and refused to make them. In order to compel them to do so, certain of the central carriers restricted their concurrences to rates that were no lower than the Column 3 rates. (R. 18, 35)

Under the compulsion of the restricted concurrences, the southern carriers published and filed with the Commission tariff schedules, proposed to

become effective May 1 and August 3, 1934, on 30 days' notice, naming new rates on coke on basis of the full maximum Column 3 scale from Birmingham, from Chattanooga, and from points in Wise County, Va., to destinations on the lines of such of the central territory carriers as had restricted their concurrences. From Birmingham and from points in Wise County, Va., the rates so published were increases, while those from Chattanooga were increases in some instances and reductions in others. (R. 16, 163)

Prior to said effective dates the southern carriers themselves and also the southern coke shippers filed protests with the Commission against the proposed schedules and requested their suspension. (R. 16, 163)

By orders dated April 30 and July 30, 1934, under section 15 (7), the Commission suspended the proposed schedules and entered upon an investigation respecting them, I. & S. Docket No. 3985. (R. 163–164) These orders of investigation put in issue the question whether the rates named in the suspended schedules would be lawful rates under the Interstate Commerce Act, and, in particular, whether they would be reasonable under section 1 (5), and free from undue prejudice and preference under section 3 (1).

A hearing was held in this proceeding (R. 202–414), briefs were filed and the case orally argued before the Commission. (R. 416–509)

On March 11, 1935, the Commission (all eleven Commissioners participating) issued a report, *Coke from Alabama and Tennessee to Central Territory,* 208 I. C. C. 281 (R. 15–32), in which it found, among other things, that rates from southern to central territory made by applying the aforesaid Column 2 scale from origins to destinations and adding thereto certain arbitraries *for hauls in southern territory,* were and for the future would be maximum reasonable rates. It further found that the suspended schedules had not been justified, and by order of March 11, 1935 (R. 32–33), required the respondents to cancel them. (R. 28, 164)

On March 20 and 28, 1936, the southern coke shippers filed petitions with the Commission requesting reconsideration of its decision and order of March 11, 1935. Replies to these petitions were filed by the central territory carriers and coke shippers on April 7, 1936. Appellants, as respondents in said proceeding before the Commission, in their replies to said petition for reconsideration, made no suggestion that the evidence introduced at the aforesaid hearing did not fully disclose all the relevant facts and circumstances and made no request for leave to submit further evidence. By order of April 15, 1936, the Commission reopened said proceeding for reconsideration on the record as it then stood. (R. 164)

On April 30, 1936, the Commission issued its report on reconsideration, 215 I. C. C. 384 (R. 33–38), seven commissioners concurring and four dissenting, in which it affirmed the finding that the suspended schedules had not been justified, and further found that rates on coke from Birmingham, Chattanooga, and Wise County, Va., to the destinations in question for the future would be unreasonable to the extent they exceeded the column 2 scale. The report and order of April 30, 1936, vacated and set aside previous orders to the extent that they required the establishment and maintenance of higher coke rates from and to the same points. (R. 164–164)

Commission's findings

The Commission's ultimate conclusion was that the coke rates in issue "for the future will be unreasonable to the extent they may exceed rates based on the distance scale set forth in the appendix * * *." (R. 37)

The rates set forth in that scale (R. 38) were the same for the same distances as the rates then in effect in central territory, which had been prescribed as maximum reasonable rates in *Coke between Points in Central and Illinois Territories,* 194 I. C. C. 640, and made effective March 15, 1934. These were the Column 2 rates; and in this connection the Commission found that "the Column 2 rates are now applicable between points in central

territory with a few exceptions mentioned in the original report." (R. 35)

In other words, the Commission found that the interterrritorial rates in issue, all of which were on the Column 3 basis, were 10% higher than the general level of coke rates prevailing throughout the destination territory.

The Commission further found that the interterritorial rates in issue were also higher than the general level of voluntarily maintained coke rates within the South. Its finding in this regard reads:

> The rates from Chattanooga, Birmingham, and Wise County, Va., to southern destinations are in certain instances slightly higher, and in others lower, than they would be if made strictly on the Column 2 basis, but they average about the same. From Chattanooga and Birmingham combined to all destinations having a population of 5,000 or more, both the present and the Column 2 rates average $2.96 per ton. (R. 35)

It thus clearly appears from the Commission's findings that the interterritorial rates in question exceeded the voluntarily-established coke rates in the South and exceeded the prescribed coke rates in the North.

The Commission found that "the southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the Column 2 rates would further re-

strict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect." (R. 35)

It was found that coke is shipped only from the Birmingham district, Chattanooga, and stations on the Louisville & Nashville and Interstate railroads in Wise County, Va., to central territory and that the traffic moves over the *main lines* of carriers reaching the Ohio River, and that all traffic from the South to central territory and the Northwest moves over those lines. The traffic density on one of the southern lines participating in the interterritorial transportation of coke, viz., the Cincinnati, New Orleans & Texas Pacific, whose line extends from Chattanooga to Cincinnati, as indicated by the revenue net tons per mile of road, "exceeded that handled by such carriers as the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, New York Central Railroad Company, and the Wabash Railroad Company, and the average handled by all lines operating in central territory, even when those which extend into western trunk line, southwestern, and southern territories are excepted." (R. 35–36)

Too much weight was given in the prior report, the Commission found, to the absence of certain specific data, that is, as to the traffic density over routes from Birmingham, *and not enough to the*

established rate adjustments in southern and central territories, and the effect rates have on the interterritorial movement of the traffic.

The Commission found that "Coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory." In this connection it said: "We have frequently recognized that the transportation burden is differently distributed in official and southern territories and that, on some commodities, rates may justly be relatively lower in the South than in official territory. We have also, in several cases where competitive conditions are somewhat analogous to those here indicated, prescribed rates from origins in western trunk line and southern territories to official territory on the basis of the scales that apply in official territory. *American Distilling Co.* v. *Akron, C. & Y. Ry. Co.*, 140 I. C. C. 633; *Newsprint Paper Investigation*, 197 I. C. C. 738." (R. 36)

The Commission found that the producers of coke in official territory (of which central territory is a part) "have no just ground for complaint against interterritorial rates from the South to central territory on the same level, mile-for-mile, as those they pay", that "if interterritorial rates higher than Column 2 rates were warranted, as the central carriers contend, because of more difficult operating conditions in the South it would be proper that the increment accrue solely to the southern carriers",

and that "the carriers in central territory are entitled only to maximum reasonable compensation for the services they perform, which will be afforded them by the prescription of the Column 2 rates." (R. 36)

The Commission affirmed the conclusion it had reached in its prior report "that the contention of the coke producers and carriers in central territory that the establishment of rates from the South on the Column 2 basis would be unduly preferential, was without merit." (R. 35) And it further found:

> Rates on coke from the South to points in central territory, on the basis of the scale hereinafter prescribed, will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers. (R. 36–37)

All of the above findings and conclusions were made in the report on reconsideration. There were, in addition, important findings of fact in the earlier report which were not withdrawn. Reference will be made to some of these later in this brief.

Changes in rates involved subsequent to making up of record herein

The rates prescribed in the order of April 30, 1936, were established and made effective August 13, 1936 (R. 162), and remained in force until November 15, 1937.

These and other coke rates generally were increased effective November 15, 1937, pursuant to the authorization in *General Commodity Rate Increases, 1937, Ex Parte No. 115,* 223 I. C. C. 657, decided October 19, 1937, in which the Commission authorized permanent increases of 3 cents per ton in all rates on coke of 75 cents per ton or less, 5 cents per ton in rates ranging from 76 cents to $1.00 per ton, and 10 cents per ton in all rates over $1.00 per ton. See pages 673, 685–688, 740, 741, 749, 762–763 of the above report.

This authorization embraced all coke rates throughout the country, including the three sets of coke rates involved in this case, namely, those in central territory, those in southern territory, and the interterritorial rates between southern and central territories.

We do not suggest that this change in the rates involved renders the case moot, as in the *Lake Cargo Case, United States* v. *Anchor Coal Co.,* 279 U. S. 812, and cases cited. The situation would seem to be similar to that of the amended regulations considered in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 413–414, as to which this Court said:

> Regulations IV, V and VII, issued by the Secretary of the Interior prior to these suits, have since been amended. But the amended regulations continue substantially the earlier requirements, and expand them. They present the same constitutional questions, and

the cases as to these are not moot. *Southern Pacific Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 433, 452; *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 514–516; *McGrain* v. *Daugherty*, 273 U. S. 135, 181, 182.

Assuming the case at bar is not moot, we suggest that the question now is, not the validity of the order of April 30, 1936, but the validity of that order as modified by the Commission's order of October 19, 1937, which reads as follows:

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of October, A. D. 1937.

General Commodity Rate Increases, 1937

Ex Parte No. 115

In the Matter of Increases in Freight Rates and Charges

It appearing, That by its report this day entered in the above-entitled proceeding, 223 I. C. C. 657, which is hereby referred to and made a part hereof, the Commission authorized certain increased rates of carriers subject to the Interstate Commerce Act;

It is ordered, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates which have

or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the increased rates herein authorized to be applied; but that in all other respects said orders shall remain in full force and effect unaffected by this order.

It is further ordered, That all tariffs or supplements changing rates under the authority of the above-entitled proceeding, which are now maintained or held by virtue of outstanding orders of this Commission shall bear on their title page specific reference to this order.

And it is further ordered, That a copy of this order be served on each carrier party to the orders referred to in the next-preceding ordering paragraph, and that a copy thereof be inserted in the docket in each such proceeding.

By the Commission:

[SEAL] W. P. BARTEL, *Secretary.*

This order is not in the record here. We have, however, deposited a certified copy of it with the Clerk.

Proceedings in Court below

Appellants, 19 central territory carriers, by petition filed July 22, 1936, sought to enjoin the Commission's order of April 30, 1936, in I. & S. 3985 naming the United States and the Commission as defendants. They filed answers. (R. 129, 131)

Certain central territory coke shippers, viz., the Interlake Iron Corporation, the Laclede Gas Light Company, The Milwaukee Coke and Gas Company, The North Shore Coke & Chemical Company, Citizens Gas & Coke Utility and the Indiana Gas & Chemical Corporation, operating by-product coke plants at Chicago, Ill., Toledo, O., Erie, Pa., Carondelet (St. Louis), Mo., Milwaukee, Wis., Waukegan, Ill., and Indianapolis and Terre Haute, Ind., intervened as plaintiffs in opposition to the Commission's order. (R. 146, 155)

These northern interveners have not joined in this appeal.

The southern railroads over whose lines the coke traffic from southern origins to central territory is transported, namely, the Cincinnati, New Orleans & Texas Pacific Railway Company, Southern Railway Company, Illinois Central Railroad Company, Nashville, Chattanooga & St. Louis Railway and Louisville & Nashville Railroad Company, intervened as defendants in support of the Commission's order. (R. 141)

The Alabama Iron & Steel Shippers Conference, whose members manufacture by-product coke in the Birmingham district, also intervened as defendants in support of the order. (R. 144)

After a hearing (R. 555–613) the Court below, specially constituted of three judges as required by the statute, made findings of fact, in 23 para-

graphs (R. 161–167), and conclusions of law in 9 paragraphs (R. 167–168), which are here quoted:

> 1. That the evidence supports the findings of the Commission, and in making its orders the Commission did not exceed its authority, and said findings support its conclusions and its order of April 30, 1936, prescribing maximum reasonable rates for the transportation in question.
>
> 2. The Commission's conclusion that the rates prescribed in the order of April 30, 1936 for future application will be maximum reasonable rates, is supported by evidence.
>
> 3. The Commission's conclusion that the rates on coke from the South to points in central territory as prescribed in said order will not be unduly prejudicial to shippers of coke within central and Illinois territories or unduly preferential of southern shippers, is supported by the evidence.
>
> 4. The Commission properly gave consideration to the effect of rates upon the movement of traffic.
>
> 5. The Commission's conclusion that the suspended rates in issue in Investigation and Suspension Docket No. 3985, proposed for interterritorial application from the South to central territory would be unreasonable to the extent that they exceeded those prescribed by said order of April 30, 1936, is supported by the evidence showing that said proposed rates were higher, distance considered, than the rates applying in either

territory through which said interterritorial traffic passed.

6. Said order of April 30, 1936, is valid.

7. This Court is not required to pass upon the validity of the Commission's order of March 11, 1935.[6]

8. The order of April 30, 1936, in Investigation and Suspension Docket No. 4198 was within the Commission's power under paragraphs (2) and (7) of Section 15 of the Interstate Commerce Act.[7]

9. The bill of complaint should be dismissed for want of equity at plaintiffs' costs.

Final decree dismissing the bill was entered January 21, 1937. (R. 185–186) This direct appeal followed.

SUMMARY OF ARGUMENT

I. The Commission accorded appellants a full hearing. Hearings were held in both I. & S. 3511 and I. & S. 3985, at which appellants were present and were accorded full opportunity, of which they availed themselves, to present evidence and to examine and cross-examine witnesses. The bill of complaint admits these hearings were held and its only allegation as to lack of hearing is that the order of April 30, 1936, in I. & S. 3985 was made

[6] This order was vacated and set aside by the Commission's subsequent order of April 30, 1936. (R. 40)

[7] This order was complied with, by suspension of the schedules referred to therein, and the proceeding was discontinued. (R. 559) Any question as to the validity of this order is moot.[6] No further reference is made to it herein.

on petitions for reopening and reconsideration on the present record, without a further hearing. Appellants' reply to the petitions for reopening and reconsideration contained no suggestion that the full facts were not before the Commission and made no request for opportunity to submit further evidence. In the absence of such a suggestion or request, the reopening of the proceeding for reconsideration on the record as it then stood did not deprive appellants of their right to a hearing.

The allegation of the lack of a hearing was limited by the bill, the answers, and the findings of the court below to the issue whether the order upon reconsideration of the record as it then stood, and without *further* hearing, deprived appellants of a full hearing. By their brief filed in this Court appellants now allege that the order deprives them of their right to a hearing on the ground that it requires reductions from southern points to all destinations in central territory, whereas there were in issue only the suspended rates which applied to a limited number of points in central territory. This contention is based upon an erroneous interpretation of the order. When the order is read with the report, of which it is a part, it clearly appears that it prescribes rates only to the destinations in issue, i. e., in Illinois, Indiana, Ohio, and the lower peninsula of Michigan to which the suspended rates applied. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 626–627; *Georgia Commission* v. *United States,* 283 U. S. 765, 772.

Aside from the merits of this contention, it should be rejected because of appellants' failure to make appropriate complaint either to the Commission or to the court below. Although they had the right to apply to the Commission for a further hearing or modification of the order they filed no such application. They made no appropriate allegation on this subject in their bill of complaint and no more than passing mention of it in the court below. *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 82 L. Ed. 205, 210–211, and cases cited.

II. The order is supported by evidence establishing the essential transportation facts, such as points of origin and destination, routes of movement, distances, volume of the traffic, character and value of the commodity, transportation conditions, etc. In addition the evidence contains voluminous comparisons of the rates in issue with other rates, especially rates on coke, establishing that the interterritorial coke rates in issue were higher than the rates prevailing on coke in the two territories through which the interterritorial traffic passes. It shows that the central territory rates were on the Column 2 basis and also that the southern territory coke rates averaged the same as Column 2, whereas the interterritorial rates in issue were 10% higher than Column 2. The coke rates in central territory had been prescribed by the Commission, Division 4; those in the South were voluntarily established and maintained by the carriers. Such comparisons may

be accepted as evidence of probative value in proving the unreasonableness of rates. *Louis. & Nash. R. R.* v. *United States,* 238 U. S. 1, 11, 15; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 565; *Virginian Ry.* v. *United States,* 272 U. S. 658, 665–666. The evidence also shows that rates lower than the Column 3 basis were in effect interterritorially from the South to many other points in central territory, i. e., to points on the lines of many carriers with lines in Illinois and Indiana that did not restrict their concurrences. The evidence further showed that the revenue under the Column 2 rates as applied to the traffic from Birmingham and Chattanooga combined would aggregate approximately the same as the revenues under the prior rates. There was much other evidence but this, without more, is sufficient to show that it was substantial, and thus meets the rule of this Court. *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S. 541, 548.

III. The order is not contrary to the "manifest weight" and "indisputable character" of the evidence. Preliminarily appellants' statement that the order requires "drastic" reductions "in all coke rates from southern points to central territory destinations" should be corrected. No reduction was more than 10%, and the rate changes resulting from the order were not all reductions but in many instances were *increases,* especially from Chattanooga and Wise County, Va. For example, to Detroit, Chattanooga's most important northern mar-

ket, the rate was increased 50 cents a ton, from $3.65 to $4.15 per ton. The fact that the Commission reached a different conclusion from that of Division 4 on a separate record obviously does not show that the Commission's order is contrary to the weight of the evidence. Appellants' argument in this connection contains a significant admission. It admits that appellants "contend for" the Column 3 scale for interterritorial application. While attacking the Commission's orders in I. & S. 3985, prescribing the Column 2 scale, appellants make no complaint against the previous order of Division 4 prescribing the Column 3 scale. They do not allege that the Column 2 scale is confiscatory. Thus appellants, in substance, ask the Court to perform an administrative function, i. e., to determine which of the two scales should apply to this interterritorial traffic. The evidence was conflicting; its weight was not "manifest" and its character not "indisputable". In cases of this kind the courts will not weigh the evidence or attempt to settle conflict in the testimony. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 100; *Ill. Cent. R. R.* v. *Int. Com. Comm.*, 206 U. S. 441, 446; *Louis. & Nash. R. R. Co.* v. *United States*, 245 U. S. 463, 466; *Warehouse Co.* v. *United States*, 283 U. S. 501, 508. The fact that the Commission did not here prescribe the same coke-rate adjustment as it had prescribed in earlier cases is not of legal significance. These earlier scales were considered and rejected. Alleged

admissions of witnesses in expressing their views as to the reasonableness of the rates in issue could not fetter the Commission's judgment on the question. The position of the southern carriers was that the Column 2 scale would be a "reasonable basis or a fair and just basis" to be applied to the interterritorial traffic. The southern shippers urged the Commission to exercise its powers to put them on a rate equality with their northern competitors, maintaining the Commission had power to do this under sections 1 (5), 3 (1), and 15 (1), stressing more particularly 3 (1), requiring nonprejudicial rates. The Commission's order was based exclusively on section 1. But to plead the law relied on is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. *Chicago, R. I. & P. Ry.* v. *United States,* 274 U. S. 29, 36–37. Under the evidence the Commission was authorized to predicate its order upon section 1, aside from the position of the parties. The Act requires "just and reasonable" rates. There is no requirement for allegation or proof of unreasonableness *per se.* The Commission did not err in considering along with all the other evidence the fact that "the southern producers of coke are able to sell in central territory only to a limited extent on the present rates" and that "the southern carriers are convinced that any rates higher than the Column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues." *Ann Arbor R. Co.* v. *United States,* 281

U. S. 658, 666–667; *Interstate Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 553–555, section 15a (2).

IV. The Commission's order, in prescribing interterritorial rates equal mile-for-mile to those prevailing throughout central territory, required equality of rates under similar conditions, and is not void on the ground that it merely equalized geographical and transportation disadvantages. It is a valid exercise of the Commission's power to prescribe reasonable rates. While general transportation conditions in southern territory are not as favorable as in central territory, and, considered as a whole, southern is a higher-rated territory than central, this is not true as to coke, since the Commission found that coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory. Coke transported from the South to central territory moves every mile of the way through territory in which the prevailing coke rates are approximately the same as the Column 2 scale. To find a higher scale unreasonable and to prescribe the Column 2 scale for application between two territories in which the rates on coke are approximately the same as the Column 2 scale seems obviously not to equalize geographical and transportation disadvantages but only to require an equal rate under similar conditions and thereby remove an artificial, unjustified *rate* disadvantage.

V. In testing the reasonableness of the interterritorial rates from the South the Commission did

not proceed under erroneous conclusions of law or misapprehension in respect of its powers. Appellants' argument in this regard is predicated upon the assertion that the sole ground for the reductions required was the level of prevailing coke rates within central territory. This was not the sole ground. It was an important fact to which the Commission did ascribe great weight, but there was also the important fact that the interterritorial rates were likewise higher than the average of coke rates generally prevailing throughout the South. In a number of previous cases the Commission has prescribed interterritorial rates from the South to official territory on the basis of the scales that apply in official territory. Appellants are entitled to just, reasonable and equitable divisions of the interterritorial rates here prescribed by the Commission. It may not be anticipated in the event the Commission prescribes divisions of these rates that it will require other than just, reasonable, and equitable divisions.

(a) The effect of the rates upon the movement of the traffic was properly given consideration in determining the question of reasonableness. By section 15a (2) the Commission is required, in the exercise of its power to prescribe just and reasonable rates, to give due consideration, among other factors, "to the effect of rates on the movement of traffic." This it must do in a case involving particular rates as well as in general revenue cases.

VI. The findings are adequate. *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464–465; *Ohio* v. *United States*, 292 U. S. 498, 511; *Florida* v. *United States*, 292 U. S. 1, 9; *United States* v. *Louisiana*, 290 U. S. 70, 80. No complaint was made to the Commission regarding the findings. The point should be overruled on this ground.

ARGUMENT

I

The Commission accorded appellants a full hearing

It is admitted in the bill of complaint that the Commission held a hearing in *Coke between Points in Central and Illinois Territories*, I. & S. Docket 3511, involving *inter alia* the reasonableness of coke rates from Birmingham (Dolcito Junction Woodward, etc.) to destinations in central territory. (R. 5) It is further admitted in the bill that after the institution of the investigation in I. & S. Docket 3985, involving the lawfulness of coke rates from Birmingham, Chattanooga, and Wise County, Va., to central territory, another hearing was held. The record shows this hearing took place at Louisville, Ky., September 11–14, 1934 (R. 202), and that counsel for appellants were present and actively participated in the examination and cross-examination of witnesses.

It was nevertheless alleged in the bill that the order of April 30, 1936, in I. & S. 3985 "was made

without hearing, but on the petitions of several parties hereinbefore set out for reopening and reconsideration on the present record." (Par. VI of bill, R. 10)

The facts in this regard were fully shown in the Commission's answer (pars. V and VI, R. 136, 137), and were found by the court below, in findings Nos. 11 and 13, which read as follows (R. 164):

> 11. Hearing in said proceeding was held in Louisville, Ky., on September 11, 12, 13, and 14, 1934, at which voluminous evidence was introduced, consisting of oral testimony of witnesses, and numerous documentary exhibits, on behalf of respondents, including plaintiffs herein, and other parties to said proceeding, including intervening plaintiffs and intervening defendants herein.
>
> 13. On March 20 and 28, 1936, the southern coke shippers filed petitions with the Commission requesting reconsideration of its decision and order of March 11, 1935. Replies to these petitions were filed by the central territory carriers and coke shippers on April 7, 1936. Plaintiffs herein, as respondents in said proceeding before the Commission, in their replies to said petition for reconsideration, made no suggestion that the evidence introduced at the aforesaid hearing did not fully disclose all the relevant facts and circumstances and made no request that they be granted leave to submit further evidence. By order of April 15, 1936, the Commission reopened said proceeding for reconsideration on the record as it then stood.

Thus the allegation that the order of April 30, 1936, was made without a hearing was limited by the bill of complaint, by the answers, and by the findings of the court below to the issue as to whether the order, made after reopening and reconsideration on the record as it then stood, and without *further* hearing, deprived appellants of a full hearing. The issue was decided below adversely to appellants.

Appellants now contend, brief, pages 19 et seq., notwithstanding the absence of an appropriate allegation below, that the order of April 30, 1936, deprives them of their right to a hearing, on the ground that the order requires reductions in the coke rates from the South to *every* destination in central territory, whereas there were in issue in I. & S. 3985 only the suspended rates which applied to a limited number of points in central territory.

This allegation is based upon appellants' own interpretation of the order, which is erroneous. The order prescribes coke rates from the southern producing points "to destinations in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan." The order was issued with the report, and as a part thereof, and the report and order are to be read together. The numerous destinations involved are not set out specifically either in the report or the order, but the report makes it clear that the only destinations involved were those to which the suspended rates applied; and the report further makes

it clear that the suspended rates applied only to destinations on such of the lines in the four States mentioned as had restricted their concurrences. (R. 18–19)

The suspended rates were described at the beginning of the report, which shows that the rates under consideration were those contained in schedules filed to become effective May 1 and August 3, 1934, "by which respondents proposed to increase the rates on coke from the Birmingham, Ala., district, hereinafter referred to as Birmingham, and from origins on the lines of the Louisville and Nashville Railroad Company and the Interstate Railroad Company in Wise County, Va., and to make reductions and increases in rates from Chattanooga, Tenn., *to destinations* in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan."

The findings in the report of April 30, 1936, indicate that the report and order dealt only with the rates "from and to the points under consideration," i. e., from and to which the suspended rates applied, especially that part of the ultimate finding (R. 37) which reads:

> The orders entered in *Coke Between Points in Central and Illinois Territories, supra,* and the orders entered in the original report herein, to the extent that they require the establishment and maintenance of rates on coke, in carloads, *from and to the points under consideration,* which are higher than those prescribed herein for application from

and to the same points, should be, and they are hereby, vacated and set aside.

Thus, the destinations covered by the order are clearly those referred to in the report, rates to which were suspended. It follows that appellants' interpretation of the order as covering every destination in central territory is erroneous and unwarranted.[8]

The situation here is similar to that dealt with in *American Express Co.* v. *Caldwell*, 244 U. S. 617, 626–627, under the heading "The scope of the order." The order there involved, making requirements respecting rates to "points in the State of South Dakota" was interpreted by this Court as not including all points in the State but only those referred to in the Commission's report. The Court said "the order explicitly makes the report which is filed therewith a part thereof," and this is true here. The opinion there further states that "if an order is believed to lack definiteness an application should be made to the Commission for further specifications." If appellants here had been in doubt as to the scope of the order they should have made application to the Commission for further specifications. Relevant here also is the opinion in

[8] It may be noted that central territory, described above, page 4, includes portions of New York, Pennsylvania, West Virginia, and Kentucky, whereas the order here involved prescribes rates only to destinations in Illinois, Indiana, Ohio, and the Lower Peninsula of Michigan. For convenience we have referred to this latter territory as "central territory," but of course it is only part of central territory.

Georgia Comm. v. *United States,* 283 U. S. 765, 772, in which this Court stated:

> The order here challenged is state-wide in operation; and it governs a vast multitude of rates. Because of divergent conditions, a doubt may well arise in applying the rule prescribed to some particular situation. But possible uncertainty of application in isolated instances is not a sufficient ground for setting aside in its entirety, by judicial process, a carefully drawn order, otherwise valid and practicable of operation over a wide territory. The appropriate remedy under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect the isolated cases; and, if necessary, to enter an independent order dealing specifically with them. *American Express Co.* v. *Caldwell,* 244 U. S. 617, 627. Such specific order, if appropriate for review under the Urgent Deficiencies Act, could be dealt with by the courts without interfering with the operation of the order as a whole or with the flexible administrative processes by which it may from time to time be modified. Compare *Railroad Commission* v. *Chicago, B. & Q. R. Co.,* 257 U. S. 563, 591; Interstate Commerce Commission Rules of Practice, Rule XV (c); and the practice in *State Corporation Comm.* v. *Aberdeen & Rockfish R. Co.,* 136 I. C. C. 173; 161 I. C. C. 273, 286; 165 I. C. C. 31; 169 I. C. C. 728; *Southern Class-Rate Investigation,* 100 I. C. C. 513; 109 I. C. C. 300; 113 I. C. C. 200; 128 I. C. C.

567; *Eastern Class-Rate Investigation*, 164 I. C. C. 314; 171 I. C. C. 481.

In connection with this contention the question arises whether appellants are now entitled in this Court to urge deprivation of hearing in the absence of complaint by them in this regard either to the Commission or in their bill of complaint in the court below. Although under section 16a appellants have the right to apply to the Commission for a rehearing in any case, and under the Commission's Rules of Practice, Rule XV, they had the right to apply "for further hearings, rehearings, reargurments, reconsideration, or modification of orders," they filed no such application after the issuance of the order of April 30, 1936.[9] Thus they failed to call to the Commission's attention the scope of the order, as they interpreted it, and failed to give to the Commission the opportunity to correct the order, if it needed correction, or to issue an official interpretation of the order, if appellants were in doubt as to its scope.[10] *They made no ap-*

[9] This was found by the court below, finding No. 15, which reads:

"15. Plaintiffs herein, as respondents before the Commission in said Investigation and Suspension Docket No. 3985, filed no petition or other request for rehearing or reconsideration of the decision and order of April 30, 1936, in said proceeding."

[10] At the argument in the court below counsel for appellants urged that the prescribed interterritorial rates were not the same as the rates applying within central territory, calling attention to the fact that rates from origins in central territory to "Zone C" in Michigan, embracing the northern

plication for a further hearing. Instead they published rates in accordance with the prescribed scale, apparently to all destinations in central territory and made said rates effective August 13, 1936, as found in finding No. 6 of the court below. August 13, 1936, was the effective date specified in the order of April 30, 1936. The order itself gave approximately three and one-half months' notice and appellants had ample time to file application with the Commission for a further hearing or for an interpretation or modification of the April 30 order. They still have that right. It would thus seem to follow that if appellants were entitled to a further hearing, they waived that right.

It is anomalous, too, that appellants urge this as their primary and apparently principal contention in their brief here when they made no appropriate allegation in this respect in their bill of complaint. No more than passing mention was made of the subject at the hearing in the Court below, and then

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part of the Lower Peninsula, were higher than to other parts of central territory. (R. 559) The order prescribing the Column 2 rates for interterritorial application, as drawn, was broad enough to embrace this Zone C, and although counsel for the Alabama shippers pointed out that Zone C is unimportant to the southern shippers, there being practically no movement to that territory from the South (R. 592), the Commission, subsequently to the argument, upon its own motion, issued an amendatory report and order, 219 I. C. C. 425, R. 158–160, making it clear that the order of April 30, 1936, was not to apply to Zone C in Michigan.

only in appellants' *rebuttal* argument. (R. 608–609) [11] In requests for findings, submitted after the trial, appellants asked the Court to make a finding on the subject (R. 175) but this was objected to by defendants on the ground that it went "beyond the allegations in the bill of complaint, there being no allegation therein that the Commission dealt with rates that were not in issue," (R. 184) and the court made no finding on the subject.

Because of appellants' failure to draw the Commission's attention to the scope of the order as they apparently interpreted it, by way of petition for rehearing or modification or clarification of the order, and because of their failure properly to plead the subject in the court below, they should not be permitted, we submit, to urge the point in this Court, and it should be rejected on this ground.

In *Natural Gas Pipeline Co.* v. *Slattery,* 302 U. S. 300, 82 L. Ed. 205, decided December 6, 1937, after referring to "The rule that a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity, *Goldsmith* v. *United States Bd. of Tax Appeals,* 270 U. S. 117; *Porter* v. *Investors Syndicate,* 286 U. S. 461; *P. F. Petersen Baking Co.* v. *Bryan,* 290 U. S. 570; see

[11] Appellants have incorporated in the record here all the colloquies and arguments in the court below. R. 198–201; 414–416; 548; 555–613. The argument of counsel for appellants [Mr. Day] appears at R. 555–573, and in rebuttal at R. 605–609.

United States v. *Illinois C. R. Co.*, 291 U. S. 457," this Court said:

> The extent to which a Federal court may rightly relax the rule where the order of the administrative body is assailed in its entirety, rests in the sound discretion which guides exercise of equity jurisdiction. *Hollis* v. *Kutz*, 255 U. S. 452; *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274; cf. *United States* v. *Sing Tuck*, 194 U. S. 161. But there are cogent reasons for requiring resort in the first instance to the administrative tribunal when the particular method by which it has chosen to exercise authority, a matter peculiarly within its competence, is also under attack, for there is the possibility of removal of these issues from the case by modification of its order. Here the commission had authority to pass upon every question raised by the appellant and was able to modify the order. In such circumstances the trial court is free to withhold its aid entirely until administrative remedies have been exhausted.

II

The order is supported by substantial evidence establishing the essential transportation facts, the lower rate levels on coke in the two territories through which the interterritorial traffic passes, and other facts on which the Commission's finding of unreasonableness rests

It is true, as appellants assert, page 25 brief, that in I. & S. 3511 there was an enormous amount

of oral and documentary evidence.[12] This evidence is reflected by the findings in the report of Division 4 in that proceeding. (R. 42–107) After the institution of I. & S. 3985 there was another hearing and much additional evidence was introduced. All parties interested in the rates appeared by their counsel, and 13 witnesses testified, in behalf of the northern railroads, the northern coke shippers, the southern railroads, and the southern coke shippers, and in addition to their oral testimony they introduced 90 documentary exhibits. The testimony, as narrated, is in the transcript. (R–202–414) The documentary exhibits are not printed but are before the Court as original exhibits. (R. 620)

In deciding I. & S. 3985 the Commission gave consideration only to the evidence in that proceeding, and this evidence is reflected by the findings in the first and second reports therein. (R. 15–32; 33–38) It shows, among other things, the essential transportation facts, such as the points of origin and destination, the routes of movement, the distances, volume of the traffic, character and value of the commodity, transportation conditions, and competitive and other conditions in the coke industry. It also shows the history of the rates, the rates then in effect, the suspended rates, the rates proposed by the southern carriers, i. e., the Column 2 scale, the Column 3 scale, and the revenues of the

[12] The evidence in 3511 was not introduced in the court below and is not before this Court.

carriers from the interterritorial coke traffic under the then-present rates, under the proposed Column 2 rates and under the Column 3 rates, and much else.

In addition, it contains voluminous comparisons of the rates in issue with other rates, and especially rates on coke. Of these comparisons, three are of outstanding importance.

1. Evidence showing the undisputed fact that the interterritorial rates on coke were higher, mile-for-mile, than the coke rates generally in effect throughout central and Illinois territories. These rates were prescribed by Division 4 of the Commission in *Coke between Points in Central and Illinois Territories, supra,* and are evidently satisfactory to the carriers, since they have made no complaint against them; and it may be noted that the Column 2 scale as so prescribed involved both increases and reductions and had for its purpose a uniform adjustment without materially increasing or decreasing carrier revenue. (R–84)

2. Evidence showing that the coke rates in effect throughout southern territory, voluntarily established and maintained by the carriers, averaged the same as the central territory coke rates then in effect. This evidence was introduced by witness Behring, Commerce Agent, Southern Railway System, in the form of an exhibit (Ex. 3), in reference to which he stated (R. 222):

> Exhibit No. 3 is a statement of four pages showing the rates between points within the

South compared with the C. F. A. scale of I. & S. Docket 3511. The stations are shown by states. The destinations are those with a population of 5,000 and over, so that there has not been any hand-picking of the points to be shown. It gives a complete picture of the coke rate adjustment in the South.

The exhibit itself shows the rates from Birmingham and Chattanooga to the many destinations in Virginia, North Carolina, South Carolina, Georgia, Tennessee, Alabama, Mississippi, Louisiana, Florida, and Kentucky, and also three points on the north bank of the Ohio River reached by the southern lines, namely, Cincinnati, Ohio, Evansville, Ind., and Cairo, Ill.; shows the distances to each point, and the then-existing rate on coke, and, by way of comparison, the Column 2 scale rate for the same distance in each case. The averages of the rates are determined and the result shows that the average of the existing coke rates in the South was exactly the same as the average of the Column 2 rates applied between the same points. In other words, if the Column 2 rates had been in effect between all these points in the South, their average would have been exactly the same as the existing rates.

3. Evidence showing that the interterritorial rates in question were on a higher level than a great many other interterritorial rates on coke from the South to portions of central and Illinois territories, namely, to many points in Indiana and Illinois.

This anomalous situation was brought about by the fact that many of the northern carriers did not restrict their concurrences, with the result that existing interterritorial rates lower than the Column 3 scale continued in effect to points on those lines. (R. 262, 263, 264, 272–273, 276, 294–295)

Exhibit 89 shows that 54 carriers whose lines lie wholly or in part in the four States mentioned did not restrict their concurrences. Some of these lines were: Akron, Canton & Youngstown; Alton; Ann Arbor; Atchison, Topeka & Santa Fe; Chicago & Eastern Illinois; Chicago & North Western; Chicago, Burlington & Quincy; Chicago Great Western; Chicago, Milwaukee, St. Paul & Pacific; Chicago, Rock Island & Pacific; Cincinnati & Lake Erie; Detroit & Mackinac; Elgin, Joliet & Eastern; Illinois Central; Pittsburgh & West Virginia; Toledo, Peoria & Western; Wheeling & Lake Erie.

The Commission's finding in this regard reads as follows (R. 18–19):

> The carriers in Illinois territory that serve southern origins or have direct connections with such carriers, and the western trunkline carriers operating in Illinois and Indiana, such as the Illinois Central Railroad Company, the Chicago & Eastern Illinois Railway Company, the Chicago & North Western Railway Company, and the Chicago, Burlington & Quincy Railroad Company, did not cancel their general concurrences, and the suspended schedules do not propose to establish the column 3 rates over

> such routes. The result is that, if the suspended schedules are found justified, rates to some points in Illinois and Indiana, including Chicago, will be available, that are lower over some routes than others. For example, the rate from Chattanooga to Chicago over the Illinois Central Railroad Company will be $4.16 and over other routes $4.55.

From Birmingham to Chicago, as another example, the coke rate in effect at the time of the Commission hearing was $4.30 over all routes. (R. 20) As the result of the restrictions in the concurrences of some of the lines, like the New York Central, the Pennsylvania, the B. & O., etc., a rate was published from Birmingham to Chicago over routes formed by their lines at $4.70. This and all similar rates were suspended. But the lower rate of $4.30, applicable over other routes, formed by lines like the Illinois Central, C. & E. I., Burlington, etc., remained in effect.

It is obvious, too, that to *local* points on the lines of these northern carriers that did not restrict their concurrences; interterritorial rates lower than the Column 3 rates remained in effect. For example, the Chicago & Eastern Illinois, having lines from Evansville, Ind., Joppa, Ill., and St. Louis, Mo., to Chicago, kept the lower interterritorial rates in effect to numerous points, local as well as joint, in Indiana and Illinois. This is also true of the Illinois Central, having lines from New Orleans to St. Louis, Louisville, Indianapolis, and

Chicago. This is also true as to the Burlington, which operates lines from Paducah, Ky. (opposite Metropolis, Ill.), and St. Louis to Chicago. This is also true as to the line of the Southern Railway through Indiana and Illinois to St. Louis, and many others that could be mentioned. (R. 264, 295)

Another subject covered by the evidence is also of importance, i. e., the revenue effect of the proposed rates. This evidence is reflected by the tables appearing in the Commission's first report and reproduced at R. 22, 23. The table appearing at R. 22, covering the traffic from Birmingham in 1933, is taken from Exhibit 61, referred to in R. 361, while the table on the following page covering the traffic from Chattanooga during 1929, is covered by Exhibit 59, R. 360. These tables show the tons of coke shipped from Birmingham and Chattanooga to Illinois, Indiana, Ohio, and Michigan, and the Ohio River crossings, giving the totals including and excluding these crossings. It seems more appropriate to take the figures excluding the Ohio River since these Ohio River crossings are reached and served by southern lines.

The revenue upon all shipments from Birmingham to the destination territory, excluding Ohio River crossings, during the year 1933, aggregated $511,709.92. The rates effective March 15, 1934, if applied to the same shipments would have resulted in an aggregate revenue of $508,135.32.

The Column 2 scale, if applied to the same shipments, would have aggregated $484,974.97. (R. 22, 360, 366–367, Ex. 61)

The rates from Chattanooga to central territory in effect prior to March 15, 1934, as applied to the tonnage from Chattanooga in 1929, resulted in an aggregate revenue of $206,744.24. The Column 2 scale applied to that tonnage aggregates $228,-791.07. (R. 23, 360, 366–367, Ex. 59)

There was much additional evidence, but that referred to above is sufficient to show that it was substantial, and thus meets the rule of this Court, as expressed in *I. C. C.* v. *Union Pacific R. R.*, 222 U. S. 541, 547–548:

> Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

Here the Commission was dealing with traffic that passes through two territories. The reasonableness of the rates on that traffic was one of the issues, and evidence was introduced tending to show that such rates were unreasonable when compared with lower rates on the same commodity in effect in both of the territories through which the interterritorial traffic passes. This evidence estab-

lished that the interterritorial rates were 10% higher than the general level of coke rates in both southern and central territories.

It is settled by many decisions of this Court that such rate comparisons may be accepted as evidence of probative value in proving the unreasonableness of rates. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 98; *Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1, 11, 15; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 565; *Dayton-Goose Creek Ry.* v. *U. S.*, 263 U. S. 456, 480–481; *Western Chem. Co.* v. *United States*, 271 U. S. 268, 271; *Virginian Ry.* v. *United States*, 272 U. S. 658, 665–666.

In the northern territory the comparative rates had been prescribed by the Commission, Division 4; those in the South were voluntarily established and maintained by the carriers.

In *Louis. & Nash. R. R.* v. *United States, supra*, at pages 15–16, sustaining the validity of an order of the Commission prescribing a reduction in the coal rate from Kentucky mines to Nashville, Tenn., based largely on proof showing that the Nashville rate was higher than that charged for a similar haul to other points, the Court said:

> Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when

> to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate.

In *Skinner & Eddy Corp.* v. *United States, supra,* the Court said, at page 565,

> * * * low rates, because voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service are unreasonably high. *Board of Trade of Carrollton, Ga.,* v. *Central of Georgia Ry. Co.* 28 I. C. C. 154, 164; *Sheridan Chamber of Commerce* v. *Chicago, Burlington & Quincy R. R. Co.,* 26 I. C. C. 638, 647. Compare *Louisville & Nashville R. R. Co.* v. *United States,* 238 U. S. 1, 11 et seq.

Under the above authorities the Commission could accept the evidence showing such comparative rates and ascribe to it such weight as in its judgment seemed proper. There was a great deal of other evidence, and in determining the question of reasonableness the Commission weighed all the evidence, ascribed great weight to the comparative level of rates on the same commodity within the two territories through which this traffic passes and reached the conclusion that the interterritorial rates were unreasonable.

That the weight of the evidence was for the Commission has been held many times by this Court. *Ohio* v. *United States,* 292 U. S. 498, 506; *Assigned Car Cases,* 274 U. S. 564, 580–581; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *St. Joseph Stock Yards Co.* v. *U. S.,* 298 U. S. 38, 50–51, and cases cited.

The facts shown above are not disputed by the appellants. Their contention, as we understand it, is not that there was no evidence to support these and other facts found in the Commission's reports, but rather that the evidence establishing those facts is insufficient to support the Commission's conclusion that the rates in question were unreasonable. Such a contention necessarily invites the Court to examine all the evidence, appraise it, and hold that the Commission erred in its judgment as to the facts. This Court has often said that it has no such power. *Ohio* v. *United States,* 292 U. S. 498, 506; *Warehouse Co.* v. *United States,* 283 U. S. 501, 508; *Los Angeles Switching Case,* 234 U. S. 294, 314; *Western Chem. Co.* v. *United States,* 271 U. S. 268, 270–271.

III

The order is not contrary to the "manifest weight" and "indisputable character" of the evidence

In section II of their brief appellants contend that the Commission's order, requiring "drastic" reductions "in all coke rates from southern points to central territory destinations," is "against the

manifest weight and the indisputable character of the evidence."

It seems important to point out, first, that no reduction was more than 10%, and that the rate changes resulting from the order were not all reductions but in many instances were *increases*, especially from Chattanooga.[13] This is reflected by a table in the first report (R. 20) showing the then-present rates and the Column 2 and Column 3 rates from Chattanooga and Birmingham to *representative* points in the destination territory. While all the then-present rates there shown from Birmingham were higher than the Column 2 rates, and the Column 2 rates resulted in reductions, many of the rates from Chattanooga were lower than Column 2, and the revision of the rates on the Column 2 basis resulted in increases. This is true as to Detroit, an important market, to which the then-present rate from Chattanooga was $3.65, whereas the Column 2 rate was $4.15. Other typical increases were: To Grand Rapids, Mich., $4.16 to $4.25; to Jackson, Mich., $3.91 to $4.05; to Columbus, Ohio, $3.28 to $3.65; to Springfield, Ohio, $3.28 to $3.45; to Dayton, Ohio, $3.28 to $3.35.

Although the Column 2 scale was prescribed for interterritorial application only as maxima, and

[13] There were also many increases in the rates from Wise County, Va. (R. 23) The tonnage from Wise County, Va., where beehive coke only is manufactured, has greatly declined in recent years (R. 309) and the tonnage now is so small as to be unimportant. For this reason the rates from Wise County, Va., are largely neglected in this brief.

did not *require* any increases, yet it was thoroughly understood that if the scale were approved, all rates would be revised to conform strictly thereto. Witness Burke, testifying on behalf of the Nashville, Chattanooga & St. Louis Railway, stated (R. 260):

> It is my position that the rates from Chattanooga to destinations in Illinois and Central Freight Association territory should not exceed the rates made on basis of the so-called Central Freight Association scale 2 as shown in Appendix 8 of the decision in I. & S. Docket 3511. Now in advocating the Central Freight Association scale from Chattanooga to the northern destinations, we are advocating it not only where it will produce increases but also where it will produce reductions in the existing rates from Chattanooga to the destinations in question. It is therefore correct to say that we are opposed to the suspended rates and in lieu thereof propose for application from Chattanooga to Central Territory the same level of rates as apply within Central Territory.

A little later in his testimony witness Burke further states (R. 265–266):

> Detroit is one of the most important points of destination for Chattanooga, Tennessee. There we have the present rate from Chattanooga to Detroit of $3.65 per ton. Under the suspended basis the rate would be $4.55 per ton. Under the basis we have proposed here the rate would be $4.15 per ton. Even under our proposed basis the rate from Chat-

tanooga to Detroit will be increased fifty cents per ton.

As to the rates from Birmingham: Those actually in effect at the time of the hearing were within the range of the Column 2 and Column 3 scales. "That is to say, to the destinations involved in I. & S. Docket 3985 the present rates from Birmingham are no lower than the Column 2 scale, and no higher than the Column 3 scale * * *." (Witness Roby, Vice President, L. & N. R. R., R. 284) Thus the Commission's order required no change from Birmingham where the rate was then on the Column 2 basis, and required reductions, ranging up to but not in excess of 10%, where the rate was higher than Column 2.

Coming now to appellants' main contention under this caption: They assign six reasons to support the contention, brief, pages 27–28, the first of which is "(a) The basis of interterritorial coke rates contended for by appellants was that fixed by the Commission on a comprehensive record and at the same time as the basis applying within central territory was prescribed by the Commission."

The reference is to *Coke between Points in Central and Illinois Territories,* 194 I. C. C. 640, in which Division 4 prescribed the Column 2 scale for application within central territory and the Column 3 scale for interterritorial application from the South. Later, the interterritorial rates came before the Commisison in *Coke from Alabama and Tennessee to Central Territory,* I. & S. 3985, and the Commission overruled Division 4 as to the inter-

territorial rates, prescribing, under the evidence before it, as adduced in the hearing in I. & S. 3985, the Column 2 scale for application from the South to central territory. While technically the proceeding before the Commission was not a rehearing under section 16a, in substance it was such a rehearing, in which the Commission could exercise an independent judgment and reach a different conclusion from that of Division 4. As stated in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482:

> The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361.

The fact that the Commission reached a different conclusion from that of Division 4 obviously does not show that the Commission's order is contrary to the weight of the evidence.

Appellants' contention in this regard contains a significant admission. It admits that appellants

"contend for" the Column 3 scale for interterritorial application. Appellants do not challenge the Division 4 order prescribing the Column 3 interterritorial scale. They attack the Commission's orders in I. & S. 3985 first prescribing for interterritorial application the Column 2 scale plus arbitraries, and then on reconsideration the Column 2 scale without arbitraries. As before shown, the Column 3 rates were 10% higher than the Column 2. Thus while assailing the validity of the order prescribing the Column 2 scale, they have no objection to rates 10% higher. But they do not allege that the Column 2 scale is confiscatory. It would thus seem that what they actually ask this Court to do is to rule that this interterritorial traffic should take the original Column 3 basis prescribed by Division 4 and not the Column 2 basis prescribed by the Commission. Since this is peculiarly an administrative question, it follows that appellants' request is in reality one that merely asks the Court to perform an administrative function, i. e., to determine which of the two scales should apply to this interterritorial traffic.

Appellants' second reason is "(b) The abundant and uncontroverted evidence offered by central territory railroads and shippers before the Commission to prove that the I. & S. Docket 3511 basis they are contending for was not unreasonably high but actually lower than it might properly be. (R. 204, 338, 368, 390, 394)."

The record citations refer to the evidence of the four witnesses who testified in behalf of the central territory carriers and coke shippers. But their evidence does not stand uncontroverted. Evidence to the contrary was given by the eight witnesses who appeared in behalf of the southern carriers and coke shippers, particularly witnesses Behring (R. 222–246); Burke (R. 260–283); Roby (R. 284–308); Widell (R. 314–333); Ribe (R. 356–368, 403–411). In general it may be stated that the northern railroads and coke shippers submitted evidence tending to show that the Column 3 scale would be reasonable, non-preferential and non-prejudicial for interterritorial application, while the southern carriers and shippers submitted evidence tending to show that those rates would be unreasonable, unduly preferential of the northern shippers and unduly prejudicial to the southern shippers, and that the Column 2 scale would be just, reasonable and otherwise lawful for interterritorial application.

The evidence was conflicting; its weight was not "manifest" and its character not "indisputable". It is established that in cases of this kind the courts will not weigh the evidence or attempt to settle conflict in the testimony. As said in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 100:

> The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary

> but sustained by substantial, though conflicting evidence. *The courts cannot settle the conflict* nor put their judgment against that of the rate-making body * * *. [Italics supplied.]

See also *Illinois Cent. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 446; *Louis. & Nash. R. R. Co.* v. *United States*, 245 U. S. 463, 466; *Warehouse Co.* v. *United States*, 283 U. S. 501, 508.

As the third reason appellants state:

> (c) Coke rates of appellants and other railroads, prescribed by the Commission for application on their lines between points in the North (*Standard Gas Equipment Corp.* v. *Lehigh Valley R. Co.*, 160 I. C. C. 4; *Hudson Valley Coke & Prod. Corp.* v. *N. Y., N. H. & H. R. R. Co.*, 129 I. C. C. 472; *Coke Producers Asso. of Connellsville* v. *B. & O. R. R.*, 27 I. C. C. 125, and other cases) were shown to be materially higher than any of the three reduced coke rate scales ordered to be established from the South to destinations in central territory. (R. 52–53)

The record citation is to the report of Division 4 in I. & S. 3511, where those cases are cited, discussed and distinguished. In the last-cited case the Commission prescribed years ago the Connellsville coke scale (R. 50), which was rejected by Division 4 as obsolete. (R. 84)

Their fourth reason is:

> (d) Admissions of witnesses for the southern interests that the I. & S. 3511 rates were

not in excess of reasonable maxima. (R. 244, 245, 279, 289, 335–6)

The witnesses referred to are Behring, Commerce Agent, Southern Railway System; Burke, Commerce Agent, Nashville, Chattanooga & St. Louis Railway; Roby, Vice President in Charge of Traffic, Louisville & Nashville Railroad; and Kerr, Vice President, Louisville & Nashville. Witnesses Behring, Burke and Roby introduced substantial evidence bearing on the reasonableness of the rates in issue. (R. 222–246; 260–279; 284–308) Behring showed that the coke rates in effect throughout the South averaged exactly the same as the Column 2 scale in central territory (R. 222), and, with the thought that

> It would seem proper with that showing that the rates from the South to Central Territory might reasonably be not higher than the scale applying in Central Territory * * *, (R. 222)

he proposed, on behalf of the Southern Railway System, the Column 2 rates for application from the South to all destinations in central territory (R. 225) as reasonable rates (R. 227). He then proceeded to give extended additional testimony and introduced six exhibits, in support of his proposal.

On cross-examination he was asked if he considered the suspended rates to be unreasonable *per se*, i. e., considered in and of themselves and with-

out regard to comparative rates or competitive conditions or whether traffic would move under them. He refused to admit that the rates would be unreasonable *per se*. (R. 244–245) The effect of these statements is that if the relevant conditions, which must be considered in fixing rates, were different, different rates might be proper.

Since the weight of the evidence as a whole was for the Commission, it of course could, even though all the carriers contended that the Column 3 rates were reasonable, find them unreasonable on the evidence. The situation is analogous to that in *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, in which the Court said, at page 549:

> But the absence of direct testimony that the 50 cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40 cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may, in terms, testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

Cf. *Interstate Comm. Com.* v. *Chic., R. I. & Pac. Ry.*, 218 U. S. 88, 98, 101, 102–103, 110–111; *Ohio* v.

United States, 292 U. S. 498, 506, 508; *Chicago, R. I. & P. Ry. v. U. S.*, 274 U. S. 29, 33–34.

Appellants' fifth reason is that "at the oral argument before the Commission not a single advocate out of the four appearing for the southern shippers and railroads contended that I. & S. Docket 3511 interterritorial rates were unreasonably high." This statement, if true, would not seem to be of legal significance in a case like the present where the proceeding was instituted by the Commission itself and where the issue was whether the rates in question were reasonable and otherwise lawful. In such a case the Commission can act upon the *evidence*, irrespective of the position of the parties. But the statement is not true. For example, one of the counsel for the southern railways, while not admitting that the suspended rates were "unreasonable *per se*," stated:

> These respondents take the position that a reasonable basis or a fair and just basis to be applied on this traffic is so-called scale 2 of Appendix 8 of the Coke Case; that is equivalent to a distance scale and these lines and their patrons feel that that is a proper basis to be applied in order to put everybody on a fair basis. (R. 449)

Appellants' sixth and final reason is that "The petitions for modification of the Commission's order filed by the southern shippers (R. 512–548) made no contention that the rates prescribed by the Commission were unreasonable, but, on the con-

trary, in their 'requested specific findings' therein, those interests expressly concede (R. 514, par. 2) that the evidence before the Commission did not warrant a finding that the rates required by the final order of the Commission were as high as reasonable maxima, and went on to say that higher rates should be established only if southern railroads elected to maintain the higher rates. (R. 514, pars. 3–4)" In those petitions the southern shippers urged the Commission to exercise its powers to put them on a rate equality with their northern competitors. They contended the Commission had power to do this under sections 1 (5), 3 (1), and 15 (1). (R. 528) They stressed more particularly section 3 (1) requiring nonprejudicial rates, urging that the lower basis of rates in central territory subjected them to undue prejudice. The Commission's order was based exclusively on section 1. The situation seems to be covered by the holding of this Court in *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 36–37:

> In disposing of the final objection, little need be said. The contention is that the commission was without power to predicate its order on paragraph (13) of section 6 of the act, because there is no formal reference in the complaint to that paragraph nor an order for an investigation under it on the commission's own motion. But the allegations of the complaint in matters of fact were sufficient to authorize the commission to consider

> the case under that provision as well as others; and this is enough. To plead the law relied on, is no more necessary in a proceeding before the commission than it is in a judicial proceeding.

It would not seem that the legal validity of the Commission's order is to be determined by reference to statements made in petitions for modification. In this proceeding, with the issues as above indicated, the Commission, acting on the evidence, could make its own findings, aside from the requests or contentions of the parties, and here it found, upon adequate evidence, that rates higher than the Column 2 scale for interterritorial application would be unreasonable.

In section III of their brief, pages 29–30, appellants say:

> Statements made by representatives of southern railroads and shippers at the hearing, on oral argument, and in their petitions for modification of the Commission's first decision and order indicate those interests had no intention of attacking as unreasonable *per se* the basis of interterritorial rates prescribed by the Commission in I. & S. Docket 3511 and contended for by appellants. According to the witnesses for the southern producers their position was (R. 367) "that the suspended rates, if approved, would establish undue or unlawful prejudice against us to this territory. Our reasons for that contention is that the grade of the Col-

> umn 2 scale itself is sufficiently high to justify its application from Birmingham."

The quotation is from the testimony, on cross-examination, of witness Ribe, Industrial Traffic Manager, of Alabama Iron & Steel Shippers' Conference. He went on to say (R. 367–368):

> The scale [Column 2] is relatively all right for longer distance[s] and low for short distances. Our position is that that level is too high for transportation within C. F. A. territory for the long hauls, and I think they are low for the short hauls. We contend that the same level of rates should obtain from Birmingham as from C. F. A. points to destinations in that territory, based on transportation conditions and our rate level within the South, our rate level on coke to the Southwest, and on the showing presented in my Exhibit No. 70 also.

Thus, the substance and effect of the witness' testimony was that the suspended rates, on the Column 3 basis, if made effective, would establish undue prejudice against Birmingham shippers, and would be unreasonable to the extent they exceeded the Column 2 basis.

Moreover, on direct examination the witness testified (R. 366):

> Q. Mr. Ribe, the question has just been raised as to the southern shippers desiring rates that are less than just and reasonable rates. I wish you would state the position of the interests for which you appear.

A. The interests for which I appear believe, based on our investigation, for which I have here presented, that the application of Column 2 from Birmingham to Central territory would represent maximum reasonable rates.

Q. Are the interests that you represent asking for anything less than reasonable rates?

A. No, sir.

Whether the parties attacked the rates as unreasonable *per se* is immaterial. It is sufficient if the parties submit evidence tending to show that the rates in issue are "unreasonable" either in and of themselves or by comparison with other rates. The term "unreasonable *per se*" does not appear in the Interstate Commerce Act. The Act requires, in section 1 (5), that all rates shall be "just and reasonable," and prohibits "unjust and unreasonable" charges. Section 15 (1) authorizes the Commission, whenever, after full hearing, it finds any rate to be unjust or unreasonable, to determine and prescribe the just and reasonable rate. There is no requirement that there be either allegation or finding that the rate is unreasonable *per se*. On this subject, the Commission, in *Lackawanna Steel Co.* v. *Director General,* 87 I. C. C. 383, 384, said:

> At the outset it should be noticed that throughout the record it is made very clear that the unreasonableness of which the complainants complain is "relative unreasonableness" as distinguished from "intrinsic"

> or "*per se* unreasonableness," the idea apparently being that a state of facts may be shown which would justify a finding of relative unreasonableness but would not justify a finding of unreasonableness *per se*. We have made use of the term "relative unreasonableness" in other cases. It is well known that substantially all of our findings of unreasonableness are, and must of necessity be, based to a great extent upon a measuring and weighing of the rates attacked with other rates which appear to afford a proper basis of comparison, so that, generally speaking, when we find a rate unreasonable, it is in effect, on account of the method by which our conclusion must be reached, a finding that the rate is unreasonable by comparison or relatively. In arriving at such a conclusion we must, of course, be convinced that the rates cited by way of comparison are properly comparable and that, when given the weight to which they are entitled they sufficiently indicate that the level of the rates attacked is too high. This question calls for the exercise of our judgment upon the particular facts presented.

The Commission has expressed the same thought in many other cases. It has also frequently pointed out that "a proper relationship between competitive groups is in many respects of greater importance to the shipping public than the measure of the rate itself." *Coal from D., T. & I. R. R. Mines*, 64 I. C. C. 564, 566. Evidence such as here presented,

showing *inter alia* the relevant transportation conditions and comparisons with rates on the same or other commodities prescribed by the Commission or voluntarily established by the carriers, is sufficient. *Int. Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541; *Louis & Nash. R. R.* v. *United States*, 238 U. S. 1, 15–16; *Virginian Ry.* v. *United States*, 272 U. S. 658.

The statement in appellants' brief, page 30, that the Commission's report itself indicates that commercial, and not traffic or transportation, conditions led the Commission to order a reduction in coke rates from the South, implies that the Commission improperly considered the following facts found in the report (R. 35):

> The southern producers of coke are able to sell in central territory only to a limited extent on the present rates. The southern carriers are convinced that any rates higher than the Column 2 rates would further restrict, if not prevent, the movement of coke from the South to central territory and reduce their revenues. The unrebutted evidence of the Chattanooga and Birmingham producers is to the same effect.

These were but a few of the many facts found in the Commission's reports, to which reference has been hereinbefore made, *supra*, pages 11–15. The Commission's conclusions and order were of course based upon all the findings and therefore it cannot be said that the order is predicated solely upon

the above-quoted findings which appellants say reflect "commercial" conditions. Hence the question really is whether the Commission committed error of law in considering these facts as to so-called commercial conditions along with all the other facts established by the evidence. The answer, we think, is not difficult. In *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, involving the joint resolution of Congress of January 30, 1925, known as the Hoch-Smith Resolution (c. 120, 43 Stat. 801, 49 U. S. C., sec. 55), the Court said, pp. 666–667:

> The resolution is in three paragraphs. The first declares it to be a true policy in rate making that the conditions which at any given time prevail in the several industries "should be considered" in so far as it is "legally possible" to do so, to the end that commodities may move freely. This policy is not new.. In rate making under existing laws it has been recognized that conditions in a particular industry may and should be considered along with other factors in fixing rates for that industry and in determining their reasonableness; and it also has been recognized that so far as can be done with due regard for the interests affected rates should be such as will permit the commodities to which they relate to move freely in the channels of commerce.

Cf. *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S., at 553–555.

Section 15a (2), added to the Act after the decision in the *Ann Arbor* case, not only permits but requires that the Commission, in the exercise of its power to prescribe just and reasonable rates, shall give due consideration, among other factors, to the effect of rates on the movement of traffic.

IV

The Commission's order, in prescribing interterritorial rates equal mile-for-mile to those prevailing throughout central territory, required equality of rates under similar conditions, and is not void on the ground that it merely equalized geographical and transportation disadvantages. It is a valid exercise of the Commission's power to prescribe reasonable rates

The substance of appellants' argument under this caption is that in requiring interterritorial rates from the South to central territory equal mile-for-mile to those in central territory the Commission merely attempted to equalize the geographical and transportation disadvantages of the producers of coke in southern territory where transportation conditions are less favorable. It is true that general transportation conditions in southern territory are not as favorable as in central territory and that considered as a whole southern is a higher-rated territory than central. But the Commission finds *this is not true as to coke.* It found, as already shown that—

> Coke is among the commodities taking commodity rates in the South which are approximately the same as those in official territory. (R. 36)

Coke transported from the South to central territory moves every mile of the way through territory in which the prevailing coke rates are approximately the same as the Column 2 scale. To prescribe the Column 2 scale for interterritorial application between two territories in which the rates on the same commodity are approximately the same as the Column 2 scale seems obviously not to equalize geographical and transportation disadvantages, but only to require an equal rate under similar conditions and thereby remove an artificial, unjustified *rate* disadvantage.

The Commission's report indicates the southern producers are under a geographical disadvantage in marketing coke in central territory. It found: "The average haul in central territory is 100 miles. Before the southern shippers can reach central territory they have to pay for hauls of 311 miles from Chattanooga and 330 to 481 miles from Birmingham to the Ohio River." (R. 27) To charge a disproportionately high rate for these long hauls would add a second disadvantage, an artificial rate disadvantage, to the natural disadvantage in distance under which they now labor. As expressed by witness Roby, L. & N. Vice President:

> As is well known, these by-product plants are scattered all over C. F. A. Territory. This close proximity of northern producers to the points of consumption gives such northern producers an enormous advantage over the southern producers. The southern

> producers, by reason of the greater haul involved in order to get their product to the northern market, to begin with, encounter a natural handicap in distance, but we feel that this disadvantage should not be compounded by requiring southern shippers to pay a freight rate which, for their longer haul, is disproportionate to the freight rate assessed against the shipper in close proximity to the markets having the natural advantage in distance. (R. 287)

The rate adjustment on coke is not a "group and differential" adjustment, such as frequently applies in the case of bituminous coal, cf. *Ohio* v. *United States*, 292 U. S. 498, 502, but is based on a distance scale. The distance scale prescribed by the order here in question had its origin in *Indiana Coke & Gas Co.* v. *Ahnapee & W. Ry. Co. et al.*, 155 I. C. C. 70, decided March 14, 1929, involving rates on coke from Terre Haute, Indianapolis, Chicago, and Milwaukee to destinations in western trunk line and Illinois freight association territories. The scale there prescribed, called the "i. f. a." (Illinois Freight Association) scale, was used as a basis for the Column 2 scale prescribed for application within central territory in I. & S. 3511. The i. f. a. scale was modified, however, so as to preserve carrier revenue. (R. 86) This Column 2 scale is the same scale as that prescribed by the order here involved. In its report in the *Indiana Coke* case, *supra*, after pointing out that "additional coke plants are being built throughout the

country quite rapidly" and that "competition between the various producers is keen," the Commission said:

> When generally speaking a commodity may be shipped from nearly anywhere to nearly everywhere, a distance scale seems peculiarly appropriate to assure equality of opportunity for all producers, prospective as well as present, and like opportunity for all consumers. * * *

The order here in question attains this end, and, we submit, is not void as equalizing geographical and transportation conditions, as appellants urge, but is a valid exercise of the Commission's power to prescribe reasonable rates. *Interstate Comm. Com.* v. *Chic., R. I. & Pac. Ry.,* 218 U. S. 88, 102–103; *Int. Com. Comm.* v. *Union Pacific R. R.,* 222 U. S. 541, 550, 554–555; *Louis. & Nash. R. R. Co.* v. *Garrett,* 231 U. S. 298, 313; *Northern Pac. Ry.* v. *North Dakota,* 236 U. S. 585, 598–599; *Chicago, R. I. & P. Ry.* v. *U. S.,* 274 U. S. 29, 32–33; *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 362.

V

In testing the reasonableness of the interterritorial rates from the South the Commission did not proceed under erroneous constructions of law or misapprehension in respect of its powers

In arguing that the Commission misconstrued the law and misapprehended its powers (brief, section V, pp. 46 et seq.) appellants assert that the *sole*

ground for the reductions required was the level of rates prevailing between points in central territory. From this premise, shown herein to be erroneous, the argument proceeds with the assertion that this was a departure from long and well-recognized standards of rate determination, was wholly without legal sanction, and was contrary to principles theretofore frequently enunciated by this Court, and generally followed by the Commission as shown by the fact that the printed volumes of the Commission's reports are full of cases dealing with similar interterritorial rates between the North and South, in which the Commission, in view of the more favorable traffic and transportation conditions in the former, had found that interterritorial rates should be higher than the basis which it had prescribed for application within the North.

The argument is unsound for the reason that the lower level of rates prevailing within central territory, while an important fact to which the Commission could and did ascribe great weight, was not the *sole ground* for the prescription of interterritorial rates on the same level as the central territory rates. In addition to the existence of the lower level of coke rates in central territory there was also the important fact that the interterritorial rates were likewise higher than the average of the coke rates generally prevailing throughout the South. This was found by the Commission, as already observed, and the report shows that the Com-

mission gave this fact considerable weight. It said:

> Too much weight was given in the prior report to the absence of the specific data referred to, and not enough to the established rate adjustments in *southern* and *central* territories, and the effect rates have on the interterritorial movement of traffic. * * * (R. 36)

Appellants' intimation that in all cases passed upon by the Commission involving north-south rates the Commission has uniformly prescribed higher interterritorial rates than those within the North, is shown to be erroneous by the report in the present case. In this report the Commission states that it has, "in several cases where competitive conditions are somewhat analogous to those here indicated, prescribed rates from origins in western trunk line and *southern* territories to official territory on the basis of the scales that apply in official territory" (R. 36), and that in *Cotton, Woolen, and Knitting Factory Products,* 211 I. C. C. 692 [decided November 21, 1935], in discussing the relation which the rates from the South to the North should bear to those within the North, it said:

> In determining these various controversies our approach has been consistently confined to the particular problem before us. * * * Whether a particular relation is unduly prejudicial to the North or to the South, and what

> change in the relation is necessary to correct the situation, is a matter of judgment on all the facts, and that judgment will lead to different results as the circumstances shown of record vary, either because of the passage of time or because different commodities are considered. (R. 37)

The fact that transportation conditions in general are more favorable in official territory than in the South (R. 36) was given due consideration by the Commission, and it differentiated as between general transportation conditions in the South and those surrounding the particular commodity in question. It held that the following pronouncement by Division 4 in *Coke Between Points in Central and Illinois Territories, supra,* while sound as a general proposition, should not in its judgment be applied in this case:

> We have recognized in numerous cases that from a rate-making standpoint southern territory is rated higher than central territory. The evidence of record indicates that the traffic density in the former is substantially less than in the latter. Where we have prescribed interterritorial rates that did not reflect this difference, special circumstances surrounding the traffic accounted for the exception.
>
> * * * * *
>
> It is true that the traffic density on the Louisville & Nashville and the Cincinnati, New Orleans & Texas Pacific, which haul a large

> portion of this traffic, compares favorably with that on lines in central territory. But in fixing interterritorial rates due consideration must be given to the adjustment as a whole, else by piecemeal revision the whole structure will be undermined. The objective must be such uniformity as will be conducive to the widest competition among shippers in a given territory, and the preservation of carrier revenue predicated upon recognized differences in territorial rate levels. Rates made to correspond closely to traffic density on particular lines would render impossible the achievement of this result. (R. 25–26)

In holding that these considerations should not be applied here, the Commission said:

> The above pronouncement is sound as a general proposition, but we do not believe it should be applied here. Coke is shipped to central territory only from a few southern origins and moves only over main arteries on which the traffic density is much heavier than that in the southern territory as a whole. The entire adjustment, to the extent that it is of interest to manufacturers or shippers of coke in southern and central territories, is before us, and there is no contention that the column 3 rates are necessary to preserve the carriers' revenues. On the contrary, the southern carriers are convinced that the column 3 rates would restrict, if not prevent, the movement of southern coke to central territory, and the evidence of the

> Chattanooga and Birmingham manufacturers is to the same effect. Under the circumstances the consideration of transportation conditions may well be confined to those actually encountered. (R. 26)

In these circumstances the statement made in *Illinois Cent. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 466, seems applicable:

> The question submitted to the Commission, as we have said, with tiresome repetition perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact and not of law. It seems from the findings, report and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

The case cited by appellants at brief 48 involving divisions of joint rates, *Atlantic Coast Line R. R. Co. et al.* v. *Arcade & Attica R. R. Corp. et al.*, 194 I. C. C. 729, 198 I. C. C. 375, affirmed *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349, related only

to divisions of joint rates on citrus fruit from Florida to points in official territory. It did not involve divisions of joint rates on coke from southern producing points to central territory, and, so far as appears, and so far as we know, there is no proceeding pending before the Commission involving divisions as between the northern and southern carriers of joint interterritorial rates on coke. Section 1 (4) of the Interstate Commerce Act requires all carriers subject thereto "in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers." Under section 15 (6) the Commission is authorized to prescribe "just, reasonable, and equitable divisions" of joint rates. It may not be presumed or anticipated in the event the Commission undertakes to prescribe divisions of the joint interterritorial coke rates in question that it will require other than just, reasonable, and equitable divisions as between the central territory carriers on the one hand and the southern carriers on the other.

(a) The effect of the rates upon the movement of the traffic was properly given consideration in determining the question of reasonableness

The second report shows that in considering the question of the reasonableness of the interterritorial rates the Commission gave weight "to the es-

tablished rate adjustments in southern and central territories, *and the effect rates have on the interterritorial movement of the traffic.*" (R. 36)

The gravamen of appellants' argument at pages 51–57 of their brief seems to be that the Commission should have closed its eyes to the effect of these rates upon the movement of the interterritorial traffic; and they contend that to give consideration to that factor finds no sanction in section 15a (2). This provision, as amended by Emergency Railroad Transportation Act, 1933 (c. 91, 48 Stat. 211, 49 U. S. C. Sec. 15a), provides:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

This section *by its terms* is applicable in all cases where the Commission exercises its power to prescribe just and reasonable rates. It has not been construed as applying only in "general revenue cases," as appellants contend. That the section was intended to apply in the case of individual rates as well as in general revenue cases is clearly indicated by the report of the House Committee, H.

R. No. 193, 73d Cong., 1st Sess., quoted in footnote 3, page 7 of the opinion of this Court in *Florida* v. *United States,* 292 U. S. 1, in which the Committee said, p. 7:

> The rule of rate making as rewritten in the proposed paragraph (2), found in section 205 of the bill, directed the Commission to give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. *It is difficult to conceive of a reasonable rate which would ignore any one of these considerations.* The Commission as a fair and impartial body acting for the Congress will continue to give consideration to these factors. In the case of the power given to the Commission to prescribe just and reasonable rates the committee does not believe that it is necessary to encumber the statutes with further language which might be mandatory in terms, but which could add nothing further to the plain duty of the Commission under the law, and which might be interpreted to imply a distrust of the Commission in prescribing just and reasonable rates. The Commission will and must give consideration to all facts developed on the record

and see to it that the record is enlightening as to such factors as are mentioned in the first section of this bill. [Italics supplied.]

VI

The findings are adequate

In their brief, section VI, page 59, appellants assert there are no findings in the Commission's reports which can be said to support the finding of unreasonableness. No attempt is made, however, to show wherein the findings are inadequate. The findings have already been reviewed; they seem obviously to be adequate. *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464–465; *Ohio* v. *United States*, 292 U. S. 498, 511; *Florida* v. *United States*, 292 U. S. 1, 9; *United States* v. *Louisiana*, 290 U. S. 70, 80.

As to the alleged lack of findings to indicate that the rates prescribed as reasonable maxima in I. & S. Docket 3511 had become unreasonable: As heretofore shown, the Commission's findings and orders in I. & S. 3985 were based upon the evidence in that proceeding. The latter was in the nature of a rehearing by the Commission of a decision by a division. Section 17 (4) expressly provides that any order of a division is subject to rehearing by the Commission as provided in section 16a. The latter section provides for rehearing by the Commission of a prior decision and it expressly provides that "if, in its judgment, after such rehearing and the consideration of all facts, including those arising

since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly." Cf. *Interstate Com. Comm.* v. *Union Pacific R. R.*, 222 U. S. 541, 550; *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482. Hence there was no necessity for specific findings on this subject.

There is no showing that this subject was brought to the Commission's attention. The Commission must make the essential quasi-jurisdictional findings in any event, for without such findings it lacks jurisdiction to make the order. But it would seem that no party should have the right in the courts to complain of alleged omissions to make subordinate findings when he has made no complaint to the Commission in that regard. The rule applicable in judicial proceedings which precludes a party from complaining for the first time in an appellate court of alleged errors below would seem to apply in this phase of judicial review of administrative orders. In *Board of Public Utility Com'rs* v. *United States,* 21 F. Supp. 543, the statutory court, in sustaining an order under section 13 (4), so held, stating (page 549):

> Under the Commission's Rules of Practice (Rule XV) it is permissible for any party, after decision, to apply for a rehearing for the taking of additional testimony, for reargument, or for reconsideration. Plaintiff did not apply to the Commission for rehear-

ing in this case. By petition for such rehearing the way was open to plaintiff to urge upon the Commission the argument which it now presents for the first time to the court as to alleged insufficiency of the findings. It should have exhausted its remedies before the Commission before appealing in this respect to the court.

See also *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300, *supra*.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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MARCH 1938.

APPENDIX

The Interstate Commerce Act (49 U. S. C.) provides:

SECTION 1

(4) It shall be the duty of every common carrier subject to this part engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this part participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *And provided further,* That nothing in this part shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

SECTION 3

(1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 4

(1) That it shall be unlawful for any common carrier subject to the provisions of this part to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part, but this shall not be construed as authorizing any common carrier within the terms of this part to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commis-

sion may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That rates, fares, or charges existing at the time of the passage of this amendatory part by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

SECTION 15

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint what-

ever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or

circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regula-

tion, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this part, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SECTION 16a

That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such gen-

eral rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

SECTION 17

(4) In conformity with and subject to the order or orders of the Commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the Commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the Commission, and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said

divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the Commission, subject to rehearing by the Commission, as provided in section sixteen–a hereof for rehearing cases decided by the Commission. The secretary and seal of the Commission shall be the secretary and seal of each division thereof.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 638.—October Term, 1937.

Baltimore & Ohio Railroad Company, et al., Appellants, *vs.* The United States of America, Interstate Commerce Commission, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[April 25, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellants, nineteen railroads operating within what is known as Central Territory—Ohio, Indiana, Illinois and Michigan, by their bill filed in the District Court Northern District of Illinois July 22, 1936, challenged the validity of two Interstate Commerce Commission orders affecting the rate structure on coke moving into that territory from southern points. Questions in respect of these rates have often been before the Commission. The court made findings of fact upon the evidence and dismissed the bill without opinion.

The first challenged order, dated March 11, 1935, followed an earlier suspension of certain proposed schedules and an investigation. It cancelled these schedules and determined what thereafter would be maximum reasonable rates upon a mileage basis. Subsequently, the proceedings having been reopened, this order was modified and reaffirmed. In the circumstances we think the court below properly declined to pass upon its validity.

The second challenged order, April 30, 1936, followed one entered April 15, 1936, which upon petition and replies reopened the proceedings for reconsideration on the record as it then stood. The later order affirmed former findings that the schedules suspended by the one of March 11, 1935, had not been justified, and prescribed future maximum rates upon a mileage basis. These were lower (some ten per cent) than those authorized prior to 1935.

Here counsel specially insist this second order exceeded the jurisdiction of the Commission since it undertook to determine rates concerning which there had been no proper notice or opportunity for hearing. But this contention rests upon an assumed construction of the order not obviously correct. The Commission has not so construed it nor has that body been asked so to do or for any further action in respect of it. Another construction brings the order clearly within the jurisdiction assumed by the Commission. In the circumstances appellants cannot prevail on this point.

Appellants further urge that the order is contrary to the weight of the evidence, not supported by substantial evidence, disregards ordinary standards for determining reasonableness of rates, is not supported by necessary findings, and represents a mere attempt to equalize geographical and transportation disadvantages, fortune and opportunities. The findings by the court below we think are adequately supported by the record. They negative these claims and leave no sufficient basis for our interference with the action there taken.

The challenged judgment must be

Mr. Justice BLACK and Mr. Justice CARDOZO took no part in the consideration or decision of this cause.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.